(23,784)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 214.

THE CHICAGO AND ALTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY A. TRANBARGER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print
Writ of error	1	1
Citation and service	3	2
Caption	5	2
Certified copy of judgment and order granting appeal in the circuit court of Cole county	6	3
Appellant's abstract of record	10	6
Caption	10	6
Second amended petition	10	6
Answer to second amended petition	17	10
Evidence for plaintiff	20	11
Testimony of G. M. Carlton	20	11
Testimony of H. A. Tranbarger	72	42
Plaintiff rests	98	57
Motion to direct verdict overruled	98	58
Evidence for defendant	99	58
Testimony of J. E. Schwaab	99	58
Map	106½	63
Testimony of H. Barker	108	65
Testimony of W. D. Taylor	127	76
Exhibit 1—Picture	144	85
4—Picture	144	85
5—Picture	145	85
6—Picture	148	87

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1914.

	Original.	Print
Defendant rests	150	88
Motion to direct verdict overruled	150	89
Instructions to jury	151	89
Verdict	155	91
Motion for a new trial	157	92
Motion in arrest of judgment	160	94
Order overruling motions for new trial and in arrest of judgment	161	95
Motion and affidavit for appeal	162	95
Order granting appeal	163	96
Judge's certificate to bill of exceptions	164	96
Stipulation as to exhibits	165	97
Case submitted and leave granted to file reply brief	166	97
Appellant's reply brief filed	166	98
Respondent's statement, brief, and argument filed	166	98
Judgment, February 28, 1913	166	98
Opinion, Bond, J., February 28, 1913	168	99
Motion for rehearing	176	104
Suggestions in support of motion for rehearing	179	106
Motion to transfer case to court *en banc*	199	119
Order transferring case, etc	200	120
Order of argument and submission	201	120
Appellant's brief filed	201	120
Respondent's brief filed	201	121
Judgment, May 10, 1913	201	121
Opinion, Bond, J., May 10, 1913	203	121
Order per *curiam* modifying judgment	209	126
Concurring opinion, Brown, J	210	127
Order allowing writ of error and fixing bond	211	127
Petition for writ of error	212	128
Assignment of errors	215	130
Bond on writ of error	219	132
Præcipe for record	224	135
Clerk's certificate to judge's signature	226	136
Clerk's return to writ of error	227	137

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Missouri, Greetings:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, at the April term 1913 thereof, between Henry A. Tranbarger, Respondent, and The Chicago & Alton Railroad Company, Appellant, a manifest error has happened to the great damage of said Appellant, as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under you- seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct said error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 2d day of June, in the year of our Lord, One Thousand, Nine Hundred and

2 Thirteen.

Issued at the office, in the City of Jefferson, with the seal of the District Court of the United States for the Western District of Missouri, Central Division, dated as aforesaid.

[Seal of the United States District Court, Western Division, Western District of Missouri.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Western District of Missouri, Central Division.

Allowed by—

HENRY LAMM,
Chief Justice, Supreme Court of Missouri.

Attest:

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

[Endorsed:] Writ of Error. Filed Jun- 2, 1913. J. D. Allen, Clerk.

3 In the Supreme Court of the United States.

THE CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.
vs.
HENRY A. TRANBARGER, Defendant in Error.

The United States of America to Henry A. Tranbarger, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C. not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Missouri, wherein The Chicago & Alton Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, this 2nd day of June, in the Year of our Lord, One Thousand, Nine Hundred and Thirteen.

HENRY LAMM,
Chief Justice.

Attest:

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

UNITED STATES OF AMERICA,
Supreme Court of Missouri, ss:

We hereby acknowledge due service of the within citation
4 this 7th day of June, A. D. 1913.

J. W. TINCHER,
CHAS. M. HAY,
Attorneys for Defendant in Error.

[Endorsed:] No. —. The Chicago & Alton Railroad Company vs. Henry A. Tranbarger. Citation. Filed Jun- 2, 1913. J. D. Allen, Clerk. Scarritt, Scarritt, Jones & Miller, Attorneys at Law, Scarritt Bldg., Kansas City, Mo.

5 In the Supreme Court of Missouri, April Term, 1909.

STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to-wit on the 21st day of September, 1909, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, a certified copy of the judgment and order granting appeal in a certain cause wherein

H. A. Trambarger, was the Respondent and The Chicago and Alton Ry. Co. was the Appellant, which said certified copy of the judgment and order granting appeal is in words and figures as follows, to-wit:

6 In the Circuit Court of Cole County, Missouri, March Term, 1909.

WEDNESDAY, March 10, 1909.

H. A. TRANBARGER, Plaintiff,
vs.
CHICAGO AND ALTON RAILWAY COMPANY, Defendant.

Suit for Damages.

Now at this day come the parties and their respective attorneys, and each announce ready for trial, and thereupon come the jury to-wit: Eugene Clibourn, Frank Wilgerson, John Schoch, Herman Wolken, H. J. Richter, Ed Wells, W. A. Dulle, Chas. Mace, J. G. Scheperle, Joseph Scheperle, Peter Vogel and Emil Schneider, twelve good and lawful men of the County who were duly selected and sworn to try the case and the cause not being concluded at the hour of adjournment, to be continued to-morrow morning at 8:15 o'clock.

And afterwards to-wit: On Thursday, March 11, 1909, it being the 9th day of said term the following further proceedings were had and done by said Court:

H. A. TRANBARGER, Plaintiff,
vs.
CHICAGO AND ALTON RAILWAY COMPANY, Defendant.

Suit for Damages.

Now again come the parties to this suit, and their respective at torneys, and the jury to-wit: Eugene Clibourn, Frank Wilgerson, John Schoch, Herman Wolken, H. J. Richter, Ed Wells, W. A. Dulle, Charles Mace, J. G. Scheperle, Joseph Scheperle, Peter Vogel and Emil Schneider, twelve good and lawful men from the County, duly selected and sworn to try this cause, and the cause not being concluded at the hour of adjournment same was continued until to-morrow morning at 8 o'clock.

And afterwards to-wit: On Friday, March 12, 1909, it being the 10th day of said term the following further proceedings were had and done by said Court:

7 H. A. TRANBARGER, Plaintiff,
vs.
CHICAGO AND ALTON RAILWAY COMPANY, Defendant.

Now again come the parties to this suit and their respective attorneys, and the jury to-wit: Eugene Clibouren, Frank Wilgerson, John Schoch, Herman Wolken, H. J. Richter, Ed Wells, W. A. Dulle, Charles Mace, J. G. Scheperle, Joseph Scheperle, Peter Vogel and Emil Schneider twelve good and lawful men from the County, duly selected and sworn to try this case and after hearing all the evidence introduced by the plaintiff and defendant, instructions of court and arguments of counsel, retire to their room to consider their verdict, and afterwards return into court the following verdict:

We the jurors find the issues for the plaintiff on the first count in the petition and assess his damages on said count at nine hundred and fifty dollars ($950.00). And we the jurors find the issues for the plaintiff on the second count of the petition and assess his damages thereon in the sum of five hundred dollars ($500.00).

EUGENE CLIBOURN.
J. G. SCHEPERLE.
JOHN SCHOCH.
FRANK WILGERSON.
H. J. RICHTER.
JOS. SCHEPERLE.
W. A. DULLE.
HERMAN WOLKEN.
EMIL SCHNEIDER.
PETER VOGEL.

Wherefore it is considered and adjudged by the court that the plaintiff have and recover of the defendant herein the Chicago and Alton Railroad Company, the sum of nine hundred and fifty dollars so assessed as aforesaid by the jury in their verdict on the first count of plaintiff's petition and that the plaintiff also have and recover of the said defendant the sum of Five Hundred dollars so assessed by the jury aforesaid in their verdict on the second count of the plaintiff's petition, said recovery aggregating Fourteen Hundred and fifty dollars and the costs of this suit and that plaintiff have execution against the defendant therefor.

8 In the Circuit Court of Cole County, Missouri, July Term, 1909.

SATURDAY, July 31, 1909,—6th Day.

H. A. TRANBARGER, Plaintiff,
vs.
CHICAGO AND ALTON RAILWAY COMPANY, Defendant.

Now again come the parties to this suit and the motion heretofore filed by the plaintiff for a new trial coming on to be heard the same

was argued by counsel and the Court being fully advised *on* the premises doth overrule said motion; also the motion heretofore filed by the defendant in arrest of judgment coming on to be heard, is argued by counsel and the court being fully advised in the premises overruled said motion. Thereupon the defendant filed its affidavit for an appeal from the action of the Court and prayed an appeal to the Supreme Court of the State of Missouri which appeal is by the Court granted to the Supreme Court of the State of Missouri, and leave is given the defendants to file their bill of exception herein at any time during the next regular term of this Court that begins on the third Monday in November 1909, and the Court fixes the amount of the appeal bond to be filed herein by the appellant at the sum of Twenty Five Hundred Dollars and grants leave for it to file the same in vacation at any time within ten days after the adjournment of this term of Court, the said bond to be approved by the Clerk in vacation.

And afterwards to-wit: On Saturday, August 7, 1909, in vacation, the following further proceedings were had:

HENRY A. TRANBARGER, Plaintiff,
vs.
CHICAGO AND ALTON RAILWAY COMPANY, Defendant.

Now at this day comes the defendant The Chicago & Alton Railroad Company and files its appeal bond in the sum of Twenty Five Hundred Dollars with the National Surety Company as sureties, which bond is by the Clerk approved.

9 STATE OF MISSOURI,
County of Cole, ss:

I, John J. Sommer, Clerk of the Circuit Court within and for the County and State aforesaid hereby certify that the above and foregoing is a true and correct copy of the judgment, order granting appeal and approval of bond by clerk in vacation in the cause wherein, H. A. Tranbarger is Plaintiff and The Chicago and Alton Railway Company is Defendant as the same appears of record in the Circuit Court of Cole County, Missouri.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court. Done at office in Jefferson City, Missouri, this 28th day of August, 1909.

[SEAL.] JOHN J. SOMMER,
Clerk Circuit Court, Cole Co., Mo.

And thereafter, to-wit on the 14th day of September, 1912, the said Appellant filed its printed abstract of the record of which pages as set out below are in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1912.

No. 15608.

HENRY A. TRANBARGER, Respondent,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY, Appellant.

10 *Printed Abstract of Record, Pages* 1 *to* 10, *Inclusive.*

In the Supreme Court of Missouri, Division Number One.

Number 15608.

HENRY A. TRANBARGER, Respondent,
vs.
THE CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appellant's Abstract of Record.

The records of the Circuit Court of Callaway County and Cole County, Mo., with reference to this cause show as follows:

That on the 8th day of August, 1908, this cause was instituted in the Circuit Court of Callaway County, Mo., by respondent filing therein his petition; that on the 7th day of November, 1908, by leave of court, respondent filed a second amended petition which is as follows (caption and signatures omitted):

Second Amended Petition.

Plaintiff for his second amended petition, leave of court being first had and obtained to file same, says that the defendant is now and was at all the times hereinafter mentioned a corporation duly organized and existing according to law and maintaining
11 and operating a line of railroad in and through Callaway County in the State of Missouri.

And for his first cause of action plaintiff says that he is now and was at all the times hereinafter mentioned the owner in fee and in possession of the following described lands lying and situate in the County of Callaway and State of Missouri, to wit: Beginning at a point at the northeast corner of Sixth and Olive Streets in the Village of Cedar City thence in an easterly direction to within fifty feet of defendant's right of way, thence in a northeasterly direction parallel with defendant's said right of way to the east and west center line of Section 9, Township 44, Range 11, thence west along said center line to Cedar Creek, thence along the public road to the point of beginning, and the same being seven and one-half acres in the south part of W. B. Scott's New Madrid Survey No. 2622, and a part of John Boyd's Survey No. 374 as conveyed to plaintiff by deed recorded in Book 28 at Page 381 and Book 30 at pg. 54 in the

office of the Recorder of Deeds of Callaway County, and containing 60 acres; that said land lies and is situate in the Missouri River bottoms, which said river on occasions of high water overflows its banks at a point west of plaintiff's said land and flows from west to east across the said bottoms adjacent to said river.

Plaintiff says that the right of way and line of defendant's said railroad extends across said Missouri River bottoms from northeast to southwest and along the east line or boundary of plaintiff's said land; that the roadbed of defendant's track across said bot-
12 toms consists of a solid earth embankment varying in height from four to seven feet, and is constructed without culverts, openings or drains of any kind across, through or under same so that the natural flow of surface water across the bottoms aforesaid is obstructed and dammed up on the west side of said embankment and defendant's said embankment thus causing the waters to back up over, stand upon and flood lands which would not be overflowed of flooded except for the obstruction caused by said embankment.

Plaintiff says that the construction of defendant's said railroad through Callaway County was completed more than three months prior to the flooding of the above described land as hereinafter mentioned, and that defendant is now, and for more than three months prior to said date had been, operating its said road; that defendant has wholly failed to construct or cause to be constructed and maintained openings of any kind across and through the right of way and road bed of its said railroad, and suitable ditches and drains along either side of the roadbed of its said line of road, to connect with any ditch or drain or water course and carry off the water along said railroad into any ditch or drain or water course, as defendant was and is required by law to do.

Plaintiff says that the Missouri River is a watercourse and that a ditch running alongside the roadbed of the Missouri, Kansas and Texas Railway Company, a corporation, which intersects and crosses the track and road bed of defendant's said line of railroad in the said Missouri River bottoms, is a ditch or drain, with
13 which said water course and ditch defendant could connect suitable openings across and through its said roadbed or right of way and suitable ditches and drains along each side of its said road bed into which the water along the said railroad obstructed and dammed up because of the construction of said railroad aforesaid, could be drained and afforded a sufficient outlet.

Plaintiff says that on the — day of June, 1908, the Missouri River overflowed its banks and the water from same flowed from west to east across the bottoms adjacent thereto until it reached the embankment on defendant's said right of way by which said embankment said water was obstructed and dammed up; that by said obstruction said water was backed over, across and upon plaintiff's said land, wholly covering and flooding the same, and on account of there being no suitable opening across and through the right of way and roadbed and no suitable ditches and drains along either side of said roadbed, said water had no means of escape or of drainage from plaintiff's said land into the Missouri River or elsewhere

and was held on plaintiff's said land until evaporated or absorbed by the earth.

Plaintiff says that openings across and through defendant's said right of way and road bed and suitable ditches and drains along either side of said roadbed, the said openings and ditches and drains connecting with the Missouri River and with the ditch running alongside of the roadbed of the Missouri, Kansas and Texas Railway Company as aforesaid would have afforded a drain and sufficient outlet for the water obstructed and dammed up by the said embankment on defendant's said right of way as aforesaid; and that the flooding of plaintiffs' said lands was wholly due to the negligence of defendant in failing as aforesaid to construct and maintain suitable openings across and through its said right of way and roadbed and suitable ditches and drains along each side of the said roadbed of its said railroad, connecting the said openings and ditches and drains with the Missouri River and the ditch running alongside the roadbed of the Missouri, Kansas and Texas Railway Company as aforesaid.

14

Plaintiff further says that there was at the time of said overflow standing and growing on said land, and belonging to plaintiff, 18 acres of corn of the value of $513, and 5 acres of potatoes of the value of $450 and 12 acres of wheat of the value of $207, all of which by the flooding of said lands as aforesaid, were wholly destroyed and lost to plaintiff.

Wherefore, plaintiff says that by the overflow and flooding of his said lands caused as aforesaid by the negligence of defendant in failing to construct and maintain suitable openings across and through its said right of way and roadbed and suitable ditches and drains along each side of its said roadbed he has been damaged in the total sum of $1170, for which sum together with his costs he prays judgment against defendant.

Plaintiff for his second cause of action reaffirms and adopts all statements and averments set forth in the first two paragraphs of this petition, the same being done for the purpose of avoiding prolixity herein.

Plaintiff says that the right of way and line of defendant's said railroad extends across said Missouri River bottoms from northeast to southwest and along the east side or boundary of plaintiff's said land; that the roadbed of defendant's track across said bottoms consists of a solid earth embankment varying in height from four to seven feet, and is constructed without culverts, openings or drains of any kind across, through or under same so that the natural flow of surface water across the bottoms aforesaid is obstructed and dammed up on the west side of said embankment and defendant's said embankment thus causing the waters to back up over, stand upon and flood lands which would not be overflowed or flooded except for the obstruction caused by said embankment.

15

Plaintiff says that the construction of defendant's said railroad through Calloway County was completed more than three months prior to the flooding of the above described land as hereinafter mentioned, and that defendant is now and for more than three

months prior to said date had been operating its said road; that defendant has wholly failed to construct or cause to be constructed and maintained openings of any kind across and through the right of way and road bed of its said railroad, and suitable ditches and drains along either side of the roadbed of its said line of road, to connect with any ditch or drain or water course and carry off the water along said railroad into any ditch or drain or water course, as defendant was and is required by law to do.

16 Plaintiff says that the Missouri River is a water course and that a ditch running alongside the roadbed of the Missouri, Kansas and Texas Railway Company, a corporation, which intersects and crosses the track and roadbed of the defendant's said line of railroad in the said Missouri River bottoms, is a ditch or drain, with which said water course and ditch defendant could connect suitable openings across and through its said road bed or right of way and suitable ditches and drains along each side of its said roadbed into which the water along the said railroad obstructed and dammed up because of the construction of said railroad aforesaid, could be drained, and afforded a sufficient outlet.

Plaintiff says that on the — day of June, 1908, the Missouri River overflowed its banks and the water from same flowed from west to east across the bottoms adjacent thereto until it reached the embankment on defendant's said right of way by which said embankment said water was obstructed and dammed up; that by said obstruction said water was backed over, across and upon plaintiff's said land, wholly covering and flooding the same, and on account of there being no openings across and through its said right of way and roadbed, and no suitable ditches and drains along either side of said roadbed, said water had no means of escape or of drainage from plaintiffs' said land into the Missouri River or elsewhere and was held on plaintiff's said land until evaporated or absorbed by the earth, to plaintiff's damage.

17 Plaintiff says that openings across and through defendant's said right of way and roadbed and suitable ditches and drains along either side of said roadbed, the said openings and ditches and drains connecting with the Missouri River and with the ditch running alongside the roadbed of the Missouri, Kansas & Texas Railway Company, as aforesaid would have afforded a drain and sufficient outlet for the water obstructed and dammed up by the said embankment on defendant's said right of way as aforesaid; and that the floodings of plaintiff's said lands was wholly due to the negligence of defendant in failing as aforesaid to construct and maintain suitable openings across and through its said right of way and roadbed and suitable ditches and drains along each side of the road bed of its said railroad, connecting the said openings and ditches and drains with the Missouri River and the ditch running alongside the roadbed of the Missouri, Kansas and Texas Railway Company, as aforesaid.

Wherefore, plaintiff says that by virtue of said Section 1110 of the Revised Statutes of Missouri for the year 1899 as amended by said Act approved March 14, 1907, he is entitled to the penalty

therein provided, to wit: the sum of $500 for which sum plaintiff prays judgment and for his costs.

That on the 1st day of December, 1908, within due time, defendant filed its answer to respondent's second amended petition, which answer is as follows (Caption and signatures omitted):

Answer to Second Amended Petition.

Comes now the defendant and for answer to the first and second counts of plaintiff's last amended petition, herein denies
18 each and every allegation contained in said counts of the last amended petition.

Further answering, defendant states that if plaintiff's land and crops received any damage as alleged in his petition, the same was occasioned by the act of God; that is, by an unusual, extraordinary and unprecedented rain, flood and overflow of the Missouri River. and other rivers and streams over which defendant had no control.

Further answering, defendant states that the said track and road through that part of Callaway County described in the petition, has been maintained in its present condition for more than ten years prior to the filing of this suit, to wit: for about thirty-five years, and there has been acquired against plaintiff a prescriptive right to so keep and maintain the said track and roadbed, and plaintiff's alleged cause of action, if any, accrued at the time of the building of said railroad track and embankment, or at such time thereafter that plaintiff is therefore barred by the Statues of Limitation, in such cases made and provided.

Further answering, defendant says that Section 1110 of the Revised Statues of Missouri, 1899, as amended, is unconstitutional and void in this:

First. That it deprives and denies to this defendant the equal protection of the law, as guaranteed to it under the fourteenth amendment of the Constitution of the United States, and it is also in contravention of the clause of the State Constitution, which provides that private property shall not be taken for *private* use.
19 Second. Because the said statute imposes a penalty which is excessive and exorbitant for the infringement of a private right not punishable by indictment or information, and does not provide to whom the penalty shall go or the person or party entitled thereto, all in violation of Section 25, of Article Two of the Constitution of Missouri.

Third. Because said action is in violation of the first section of the fourteenth amendment of the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and without just compensation or any compensation whatever.

Fourth. Because said statute is ex-post-facto and retrospective in its effects or operations, and takes from this defendant, vested rights and impairs its contract obligations, all contrary to Section Fifteen, Article Two of the Constitution of Missouri.

Fifth. Because the act in question, contains more than one dis-

tinct subject matter, contrary to Section Twenty-eight of Article Four of the Constitution of Missouri.

Wherefore, defendant having fully answered, prays to be discharged with its costs in this behalf expended.

20 *Printed Abstract of Record, Pages* 72 *to* 172, *Inclusive.*

G. M. CARLTON, of lawful age, produced as a witness on behalf of the plaintiff, being first duly sworn, upon examination testified as follows, to wit:

Direct examination by Mr. HAY:

Q. Your name is George Carlton?
A. My name is George Carlton; yes, sir.
Q. Where do you live Mr. Carlton?
A. Jefferson City.
Q. How long have you lived in Jefferson City?
A. About twenty months.
Q. How old are you?
A. I am fifty-nine years old the 13th day of last November.
Q. Where did you live before you came to Jefferson City?
A. I lived over in Callaway.
Q. What part?
A. I lived over there about three miles north of Cedar City.
Q. Are you the owner of any property in the Missouri River bottom?
A. Yes, sir.
Q. How long did you live over on the opposite side of the river in the Callaway bottoms?
A. Why, I have lived there all my life. I was born there.
21 Q. Were you living there at the time of the construction of this Chicago & Alton Railroad through Callaway County?
A. Yes, sir.
Q. When was that?
A. That was in 1872, I think.
Q. 1872?
A. Yes, sir.
Q. Of course, you are not now testifying as to when the present company began operating the road?
A. No, sir.
Q. Where were you living at that time?
A. I was living up at the old home place.
Q. I will ask you, Mr. Carlton, to describe the construction of the Chicago & Alton Railroad Company at the time it was constructed in 1872; first, as to the direction which it extended across the Missouri River bottoms from the Callaway bluffs to the Missouri River.
A. Well, it runs a southwest direction to a northeast direction across the bottoms.
Q. Southwest to northeast?
A. Southwest to northeast; yes, sir.

Q. How is it constructed?

A. Why, it is a dirt embankment thrown up; it will run from four to seven feet in height*h*?

Q. And how wide and broad?

A. Well, I suppose it is ten feet at the top; ten or twelve.

Q. At the time the road was first constructed was there any opening made across or through this embankment?

A. Yes, sir; just north of where the——

Mr. JONES: We object to that, if Your Honor please, it is entirely immaterial to any issue in this case.

22 Mr. SILVER: It shows there was a drain up there. We have to show that to a certain extent.

By the COURT: Objection overruled.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

The WITNESS: About five or six hundred *north of five or six hundred* feet north of where the M. K. & T. crosses the C. & A. there was a culvert.

Mr. HAY: Of what dimensions?

A. It was between twenty and twenty-five feet.

Q. Was that an opening through the roadbed?

A. Yes, sir; that was an opening for the bed of old Turkey Creek.

Q. It was an opening for the bed of old Turkey Creek?

A. Yes, sir.

Q. Did you see the map which was offered in evidence? I will ask you to indicate on this map, Mr. Carlton, where the opening was made through the Chicago & Alton (shows the map marked Exhibit A to the witness.) Here is the bed of old Turkey Creek, here is the Chicago & Alton Railroad; this is north.

A. The opening was here (indicating on map).

Q. The opening was made at this point which has been explained as five hundred and seventy feet north of the M., K. & T. Railroad. How long was the opening maintained, Mr. Carlton?

A. That opening was filled up.

Mr. JONES: Just a minute. We object to that. I think that is entirely immaterial to the issue in this case.

23 By the COURT: I think it is a circumstance to go to the jury on that question of the situation over there; as to the lay of the land; the physical condition. Go ahead; objection overruled.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

A. Why, it was filled up in—I think along about 1895.

Mr. HAY: I will ask you whether or not the conditions, the drainage conditions at this point here are any different now from what they were at the time this was maintained?

A. Are the drainage any different?

Q. Yes; whether or not there is a depression there now that was there at that time?

A. Yes, sir.

Mr. JONES: Just a minute. We object to that, if Your Honor please, as being too indefinite and calling for a mere conclusion of the witness.

The COURT: Yes, ask him about the facts.

Mr. HAY: At the time the road was constructed state whether there was a drain at the point where the opening was made through the roadbed of the C. & A.?

A. Yes, sir.

Mr. JONES: I object to that as immaterial.

A. For several years——

By the COURT: Just a moment. Of course, the real question in issue is the later conditions.

Mr. SILVER: This is preliminary history to the situation, that is all, and it bears directly upon the topography over there.

24 By the COURT: Well, he may answer.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Read that last question and his answer.

Q. (Repeated by the stenographer:) "At the time the road was constructed state whether there was a drain at the point where the opening was made through the roadbed of the C. & A.? A. Yes, sir."

Mr. HAY: I will ask you whether or not the conditions of the drain has remained, or whether the conditions remain the same from that time since?

A. Yes, sir.

Q. How long have you known this old bed of Turkey Creek, Mr. Carlton?

A. Oh, I have known it all my life.

Q. What is this old bed of Turkey Creek, as you call it?

A. Why, that old bed was once Turkey Creek. Turkey Creek flowed down the bed of that old Turkey Creek and went on down east, down the bottom.

Q. It flowed in what direction?

A. East.

Q. Beginning northwest of North Jefferson?

A. Where it turned around the bluff there it flowed a little south, and then turned a little northeast, and then east; zig-zagged about a little, perhaps two or three hundred yards there would be a little crook in it that would run a little north, and then east or southeast, but it run right straight down the bluff, right on down the bluff.

Q. Into what did it empty?

A. Turkey Creek.

Q. Yes, sir.

A. Why, it went away down and emptied away down below there this side of Wainwright.

Q. Into what?
A. Into the creek.
Q. What creek?
A. I think it was Revan.
Q. Where is the present—is there any Turkey Creek over there now—is there any Turkey Creek there now, a living stream, called Turkey Creek?
A. Yes, sir, Turkey Creek was changed right there at the bluffs; they cut a ditch and run it west into Cedar Creek.
Mr. JONES: When was that?
Mr. HAY: Pardon me, I will examine the witness. When was that, Mr. Carlton?
A. That change was made about 18—between '65 and '67, right along there.
Q. How far is the present Turkey Creek where the change was made that you speak of from the Chicago & Alton Railroad?
A. How far is it?
Q. Yes.
A. Oh, it is, I suppose, a quarter.
Q. A quarter west?
A. Yes, sir.
Q. Now, I will ask you into what does the present Turkey Creek empty?
A. It empties into the bed of what used to be old Cedar Creek.
Q. Into what does that empty?
A. Into the Missouri River.
Q. It empties into the Missouri River how far from where it turns from the bed of old Turkey Creek?
A. How far?
Q. Yes, how far is the Missouri River from the point where the present Turkey Creek leaves the old bed of Turkey Creek?
A. Well, it's over a mile.
Q. In what direction?
A. Why, it is southeast; a little southwest, I mean.
Q. Now, the Missouri River is what direction, or flows in what direction, south and southwest of where the present Turkey Creek leaves the bed of old Turkey Creek?
A. Why, it flows south, southeast.
Q. Southeast?
A. Yes, sir.
Q. Have you ever noted whether or not—no—I will ask you whether or not at present there are any openings through the roadbed of the Chicago & Alton Railroad Company?
A. No, sir.
Q. Are there any lateral ditches?
A. Well, there isn't any openings, no, sir, there is no openings. Yes, sir, there is a ditch. I guess it is a half or a quarter south of where the M., K. & T. crosses the C. & A. and runs along the side of the west side of the C. & A. down to Cedar City, and then it runs and turns west over into the creek.
Q. On the west side of the C. & A. you say?

A. Yes, sir.
Q. That begins how far south of the station of North Jefferson?
A. Well, it is something like a half quarter, a quarter or half-quarter; I don't know just how far.
Q. And the ditch empties into what?
A. It empties into Turkey Creek, now you term it.
Q. Now, when was this constructed?
A. That was constructed some time in July.
Q. What year?
A. 1908.
Q. July, 1908?
A. Yes, sir.

Mr. JONES: Now, if the court please, we move that all that testimony be stricken out for the reason that it occurs since the suit.

27 Mr. SILVER: It doesn't appear that it was constructed since July, 1908; the flood had not subsided then.

Mr. HAY: I think the court will see the object of our offering all this evidence. Of course, one of the duties which we claim the company neglected was the construction of lateral ditches as well as cross openings, and if it appears in evidence that ditch was constructed even after this which did afford an outlet for surface water, it would be material as showing that the ditch constructed prior to this flood would have—would afford an outlet to this surface water.

By the COURT: Objection sustained to the testimony as to the ditches that they have constructed since the overflow. The testimony as to ditches which were not in existence at the time of the overflow may be stricken out.

And to which ruling on the part of the court, the plaintiff, by his counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Very well. Now, Mr. Carlton, I believe I asked you whether there were any cross openings in the roadbed and you said there were none?
A. Yes, sir, there are none.
Q. Now, I will ask you if you have noted whether or not the embankment of the C. & A. Railroad as at present constructed has ever at any time obstructed or dammed up the flow of surface water across the Missouri River bottom?
A. Yes, sir.
Q. When?
A. Why, in 1908.
28 Q. Did you ever notice it before that?
A. Yes, sir, 1903.
Q. 1903?
A. Yes, sir.
Q. 1903 and 1908. Now, I will ask you if you noted from what direction or source the water which was obstructed by this embankment came across the bottoms?

Mr. JONES: Just a moment. We object to that unless the witness shows that he was down there at the time the water came in. I don't know whether he was there, or not.

A. I was there. I will state that to start with.

Mr. HAY: With your assistance we will get this out. You say you did know that?

A. Yes, sir.

By the COURT: He says he was there.

Mr. HAY: Now, what direction did it come from?

A. That old Turkey Creek bed.

Q. Yes, sir, the old Turkey Creek bed. The water then flowed in what direction?

A. Why, it flowed around through the Turkey Creek bed; it started in there and run south and southeast, and then it turned and run a little northeast, and then turned southeast again until it struck the Chicago & Alton roadbed, and then it turned and run along with the roadbed until it come to the M. K. & T., and then it run through the culvert that the M. K. & T., is on, over on the Wagner land—three acres there.

Q. That is south of the M. K. & T.?

A. Yes, sir.

29 Q. On the west?

A. Yes, sir, on the Wagner land, and the Carl land, the Tranbarger land, and the Carlton land; some land that I own.

Q. Now, after the water came down old Turkey Creek bed and was obstructed by the embankment of the Chicago & Alton Railroad Company what direction then was it backed or overflowed?

A. The embankment of the C. & A. track backed the water west over this land.

Q. Now, as I understand you, it first flowed through the culvert?

A. Through the culvert.

Q. Of the M. K. & T. Now, what sort of an opening is this in the M. K. & T.; how large is it?

A. It is about four feet in width, and about five feet I reckon; it is something like square. It is a concrete construction.

Q. I will ask you whether or not you know of your own personal knowledge that the water which came upon the plaintiff's land in this—the land of the plaintiff in this suit, in the flood of 1908 came through the culvert of the M. K. & T. Railroad?

A. Yes, sir. I was there on Sunday, June 14th, when that water just started through that culvert, about between ten and eleven o'clock on Sunday.

Q. In what direction then did the water flow?

A. It run through on the south side and on to this land of Mr. Wagner's—he has three acres right there in the corner—and on Mr. Carle's land and Mr. Tranbarger's land.

Q. Mr. Carle's land is south of Mr. Wagner's and Mr.

30 Tranbarger's land then is on south of Mr. Carle's?

A. Yes, sir.

Q. Where is your land?

A. My land is mostly—my land is north of Mr. Carle's land. My land lays—my land don't -but against the Chicago & Alton; my land butts against the M. K. & T.

Q. What direction did the water in coming from Mr. Tranbarger's land, the plaintiff in this suit, what direction did that flow?

A. Why, when the water, when it come down there, of course, the ground is a little lower than next to the C. & A. track. It flowed up that, and then the water flowed west; backed out west.

Q. Now, did you note at the time of the overflow the direction in which the water was flowing?

A. Yes, sir.

Q. Or backing?

A. Yes, sir.

Q. How did you observe that; how could you tell it?

A. You could just see the water coming back.

Q. Did you notice the driftwood?

A. Yes, sir.

Q. Coming in which direction?

A. Why, it went west, back west.

Q. Back west?

A. Yes, sir.

Q. I will ask you how much of the plaintiff's land was covered by the water flowing from east to west, backing up, by the embankment of the Chicago & Alton?

A. Well, it was pretty near all of it.

Q. Pretty near all of it?

A. Yes, sir, practically all of it.

Q. Was there any crops on the land?

A. Yes, sir.

31 Q. What was the effect upon these crops?

A. Well, it ruined the crops.

Q. What kind of crops were on Mr. Tranbarger's land?

A. He had about thirty acres of wheat, and twenty acres of corn, and five acres of potatoes.

Q. What was the prospects of these crops?

A. Fine. I never saw a finer prospect of corn and wheat and potatoes.

Q. You say this was totally destroyed?

A. Totally destroyed, with the exception I think Mr. Tranbarger possibly got a little up next to the stock yards.

Q. About how much of his land was not at any time covered with water?

A. Why, there wasn't, but very little of it.

Q. How many acres?

A. That wasn't covered? I don't know how much. An acre or two.

Q. An acre or two?

A. Something like that.

Q. Now, Mr. Carlton, is there any place along the line of the roadbed of the Chicago & Alton Railroad where the company prior to this flood could have constructed an opening through the roadbed of their line of road, connecting with any ditch or drain or water course so that this water would have been conveyed off through the ditch or drain or water course and not on to the land of plaintiff?

Mr. JONES: We object to that as calling for the argument and conclusion of this witness and invading the province of the jury, and for the further reason that this witness has not shown himself to be a civil engineer or competent to pass on it.

32 Mr. SILVER: Of course, whatever this witness says is subject to cross examination.

Mr. JONES: He is asking this witness to pass upon the very gist of this case.

By the COURT: This is one of those situations where it is difficult to convey to the jury the whole situation. Objection overruled, go ahead.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Go ahead, Mr. Carlton.

A. Sir?

Q. Answer the question, Mr. Carlton.

A. Yes, sir, I will. What is the question?

Q. (Repeated by the stenographer.) "Now, Mr. Carlton, is there any place along the line of the roadbed of the Chicago & Alton Railroad where the company prior to this flood could have constructed an opening through the roadbed of their line of road, connecting with any ditch or drain or water course so that this water would have been conveyed off through the ditch or drain or water course and not on to the land of plaintiff?"

A. Yes, sir.

Q. I would like to state that question in a little different manner.

Mr. JONES: It is already answered now. He can ask another question.

Mr. HAY: Now, where is that point?

Mr. JONES: The same objection to that question, and for

33 the further reason that it calls for the witness—requires the witness to pass upon a question of law and fact.

By the COURT: Yes, I think the situation is such that on cross-examination this matter can be handled so that the jury will not be misled. Go ahead.

And to which ruling and decision of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

The WITNESS: If there had been a crossing across the bed of old Turkey Creek, an opening, and also an opening where the Chicago & Alton crosses the M. K. & T. on the north side, if there had been two openings there I think it would have carried the water off.

Mr. HAY: Now, where would that water have gone, Mr. Carlton?

A. That would have gone down the drain along the west side, or the north side of the M. K. & T. into Clear Branch.

Q. Would this have gone down any distance—the Chicago & Alton—on the east side if there had been a ditch on the east side?

A. I think not.

Q. Would it—what would it have gone into on the east side of the Chicago & Alton?

A. On the east side of the C. & A.

Q. When it first went through?

A. It would have went—the bed of the Turkey Creek it runs, comes across and runs right across—it don't run, the bed of Turkey Creek don't run down along the side of the C. & A., it runs across the corner of Mr. Wagner's land and strikes the M. K. & T., and then it follows the M. K. & T. on east until it empties into Clear Branch.

34 Q. Now, I will ask you to describe this bed of Turkey Creek, the drain of Turkey Creek, and the drain on the north side of the M. K. & T. that you have just mentioned.

A. Well, that is I suppose thirty feet—it is thirty feet wide; thirty or forty feet wide, and it is about four feet deep.

Q. Yes. Has it banks?

A. Yes, sir.

Q. What direction does it slope?

A. Why, it slopes east.

Q. I will ask you if there is any obstruction of any kind in the ditch which would—or drain, which would prevent the flow of water from west to east?

A. Nothing, only down there where the county road crosses over the M. K. & T. there is a little—where they threw up the road a little to get over the track; perhaps a foot of water; about that high.

Q. I will ask you whether or not this little elevation there is sufficient to fill the ditch or drain so as to obliterate the depression or drain absolutely?

A. No, sir; it would have passed right over that and went right on east.

Mr. SILVER: There is a depression in the road?

Mr. JONES: I think one counsel ought to be sufficient to examine one witness.

A. Yes, sir.

Mr. HAY: Now, Mr. Carlton, with what does the ditch or drain on the north side of the M. K. & T. connect—on the east?

A. Clear Branch.

Q. Connects with Clear Branch, you say?

A. Yes, sir.

35 Q. On the east you say that connects with Clear Branch?

A. Yes, sir.

Q. Now, in what direction does Clear Branch flow?

A. Clear Branch flows a little southeast, and then it turns and flows you might say due east.

Q. Into what?

A. Into a creek down there called Double Branch.

Q. What direction does that flow?

A. Double Branch flows south into the river.

Q. What river?

A. The Missouri River.

Q. How far is the Missouri River from where the water course—

from where the drain of the old Turkey Creek bed crosses the C. & A. track?

A. How far is the river?

Q. How far is the Missouri River where Double Branch empties into it from——

A. You mean where——

Q. Wait until I ask my question.

A. Yes, sir.

Q. How far is the Missouri River where Double Branch empties into it——

A. Clear Branch empties into Double Branch?

Q. Yes.

A. How far is it to the river?

Q. Yes.

Mr. MILLER: From where, Mr. Hay?

By the COURT: From where Clear Branch empties into Double Branch.

A. Why, it's about—let me see—about two miles and a half.

Mr. HAY: How far is it from this—how far is it from where the water course or the roadbed of the C. & A. crosses this old
36 water course of the Turkey Creek to Clear Branch?

A. Well, sir, it is over a quarter, but I don't hardly think it is a half a mile.

Q. How far is it over there—how far is it from Clear Branch to Double Branch, at that point on Clear Branch to Double Branch?

A. I said about two and a half miles.

Q. To Clear Branch?

A. No; to Double Branch.

Q. I think you don't understand me. How far is it from the Chicago & Alton where the old bed of Turkey Creek crosses it——

A. I understand that.

Q. — to Clear Branch?

A. I told you it was—I didn't think it was quite a half; more than a quarter.

Q. How far is it from that point to Double Branch?

A. You are in Double Branch; you keep in Double Branch.

Q. How far is it from that point to where Clear Branch empties into Double Branch?

A. It is, I said, about two miles and a half below there, east of there.

Q. How far then to where Double Branch empties into the river?

A. Possibly two miles; maybe more than that; two or two and a half.

Q. Now, Mr. Carlton, I will ask you if you have at any time seen any water draining through this drain or ditch on the north side of the M. K. & T.?

A. Yes, sir.

Q. When?

A. Why, I seen it, water drain through there; the other day.

Q. Just a little louder.

A. The water that come out of Clear Branch there run
37 down to the county road and then down this drain to the M. K. & T.

Mr. MILLER: Where it came out of Clear Branch?

A. Yes, sir. Surface water that run off the field down there run down against the track; that drains that off down into Clear Branch.

Mr. HAY: When did you note this water, Mr. Carlton?

A. I noted water there the other day.

Q. Day before yesterday?

A. Yes, sir.

Mr. JONES: We object to that and move to strike it out.

By the COURT: Objection overruled.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Now, in what direction was that water flowing?

A. East.

Q. Now, did you note whether—you spoke about the flood of 1903, I will ask you how the water came down acros- the bottoms to the C. & A. embankment in 1903?

A. Why, it came down the same way, down the bed of the old Turkey Creek.

Q. How did it get on to the land of the plaintiff, and the other bottom land adjacent?

A. Went through the culvert on the M. K. & T.

Q. It was in the same way as in 1908?

A. Yes, sir, yes, sir; the same thing in 1908.

Q. Now, did the water of 1903 get as high or higher than
38 in 1908?

A. Got a great deal higher. Of course, it covered the whole bottom in 1903.

Q. Did it finally get high enough to swipe out the embankment entirely?

A. Yes, sir, washed the embankment down level with the ground, right where the bed of old Turkey Creek it washed it out entirely.

Q. What, in feet, was the rise of 1903?

A. How many feet?

Q. Yes, sir.

A. Well, I think it was thirty-seven feet; something like that.

Q. What was the rise of 1908?

A. Why, I think it was four feet less than that.

Q. About thirty-three feet?

A. Four feet and some inches less than in 1903.

Q. Now, I will ask you, Mr. Carlton, how much water, or how much of the land on the east side of the C. & A. tracks south of the M. K. & T. tracks in 1908 was covered with water?

A. Well, there was very little water—very little land there—very little land covered with water.

Q. On the east side?

A. On the east side; yes, sir. Those fellows over there were

ploughing corn and cutting wheat and digging potatoes and one thing and another, and the west side was running a steamboat; four to six feet of water in places. That is next to where it was backed up against the C. & A. I guess it *it* was four or five feet deep.

Q. Were the crops destroyed on the east side?

A. No, sir. No, they were ploughing, and the boys were singing and ploughing corn just the same as there was no flood going on; in most places, that is near the track.

39 Q. Now, Mr. Carlton, you are a farmer?

A. Yes, sir.

Q. Have been for years?

A. Yes, sir.

Q. And are a retired farmer now?

A. No, sir; I am living in town and farming in the country.

Mr. JONES: You are an agriculturist now?

A. Yes, sir.

Mr. HAY: Now, Mr. Carlton, what would you say the wheat was, as you saw it and judged it as it was growing upon the land of plaintiff at the time of this overflow, what would it have made per acre if it had not been damaged?

Mr. JONES: We object to that, if Your Honor please, as an improper question, and not the proper measure of damages and purely speculation.

By the COURT: Well, I suppose the measure of damages is the value of the crop at the time, but these other matters can be inquired into as elements going to make up what that is. Go ahead.

And to which ruling and decision of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Answer the question.

A. Why, Mr. Tranbarger had about thirty acres of what I call fine wheat; it would have made over—from twenty-five to thirty bushels to the acre.

Q. What would the potatoes have made per acre?

Mr. JONES: Same objection to that.

A. One hundred and fifty bushels to the acre.

Mr. HAY: And the corn?

40 Mr. MILLER: Same objection.

A. The corn would make fifty bushels to the acre.

By the COURT: You say it made, or would have made?

Mr. HAY: Under normal conditions it would have made.

A. Yes, sir; yes, sir. I am judging on my premises. Mr. Tranbarger had fully as good corn as I had and I had about two acres left on my own and I shucked and weighed my corn on the scales and I got ——

Mr JONES: We object to what he got.

Mr. HAY: How long have you been a farmer, Mr. Carlton?
A. All my life.
Q. How long have you been farming there in the bottom?
A I have been farming there during all my life practically.
Q. In that locality?
A. Yes, sir.
Q. Did you have any corn or did Mr. Tranbarger have any corn raised in the bottom on the same kind of land this year that was not overflowed?
A. Did he have any?

Mr. MILLER: I object to that as immaterial.

A. A few acres.

By the COURT: The reasonable value of the crop at the time and what it would then have been worth is the question. No, I don't think you can show what it would make afterwards.
Mr. HAY: Very well, Your Honor, we withdraw that question. We don't care to urge it at all. That is all.

41 Cross-examination by Mr. JONES:

Q. Mr. Carlton, you say that you have never known the water to overflow this land of Mr. Tranbarger's but twice since you have known it?
A. Twice, that is all.
Q. That was in 1903, the time of the big flood?
A. Yes, sir.
Q. And the flood of 1908?
A. Yes, sir.
Q. How long have you been farming in that bottom?
A. Well, I have been—I am fifty-nine years old.
Q. Been farming with it all your life?
A. Yes, sir.
Q. Now, do I understand you to tell this jury, Mr. Carlton, that all of the water that came over on Mr. Tranbarger's land came down this old Turkey Creek bed and through this little culvert along the M. K. & T. track just west of the C. & A. junction?
A. There was a little water came in on Mr. Tranbarger's land a little south of his house there, covering possibly a couple of acres; two or three acres.
Q. Didn't that connect right up with the other water?
A. No, sir.
Q. Wasn't there a solid sheet of water right across Mr. Tranbarger's land clear to Turkey Creek?
A. No, sir.
Q. Were you down there at the time of the high water elevation?
A. Yes sir.
Q. You were down there on the 19th?
A. Yes, sir.

42 Q. You say there wasn't at any place across Mr. Tranbarger's land a solid sheet of water running clear to Turkey Creek?

A. No, sir. From Mr. Tranbarger's orchard up pretty near to the Carl corner the water didn't come together, the two waters.

Q. Well, show us here now on this map where the waters in Turkey Creek and the waters over on Mr. Tranbarger's land all come together (shows the witness the map offered in evidence).

A. Well, Mr. Tranbarger's house—this is Turkey Creek—Mr. Tranbarger's house sets back here. The road runs in front of Mr. Tranbarger's house, right in here (indicating on map).

By the COURT: When you speak of the bed of Turkey Creek, you mean the present bed of the present Turkey Creek?

A. Yes, sir. North of Mr. Tranbarger's house pretty near up to the Carl land here the waters didn't get together, and here in front of Mr. Tranbarger's house here, runs down in here; there's some water run in here. Here's Mr. Transbarger's, all along in here, they come together.

Mr. JONES: You are indicating now south of Mr. Tranbarger's house down to Cedar City?

A. Yes, sir.

Q. The waters there all came together?

A. Yes, sir.

Q. Now, then, up here about the north line of the Tranbarger land and the south line of the Carl land there is a little swail runs through there?

A. That is all on Mr. Carl. Right up here at the county road there is hardly any of it on Mr. Tranbarger, it stops right back here, the low part, on Mr. Tranbarger.

43 Q. There is considerable of the low on Mr. Tranbarger there?

A. Yes, sir.

Q. Now, that was all connected right up with the back water from Turkey creek, wasn't it?

A. Yes, sir; right in this low place there was, up to about there, right in here. The high point of Mr. Tranbarger's land, where he had corn, right down to his orchard here, the two waters didn't come together.

Q. You mean that along the county road there is a high ridge through there that was dry?

A. Yes, sir; there is a bank like where the fence is. It is higher there and the road is much lower than the field.

Q. Of course, all this water from Turkey Creek and all in here was altogether?

A. Which water?

Q. All in here and Turkey Creek was all a solid sheet of water (indicating all the time on the map)?

A. No, not in here; no, it wasn't here and it wasn't there, and then up here on my own land it was only on two places that the water come together, one right up there and one here (indicating).

Q. You don't understand me. I understand there were high strips along the county road that were out of water?

A. Yes, sir.

Q. But, of course, the water was at the same level over here in

Turkey Creek and over here on Mr. Tranbarger's land; wherever the water was west of the C. & A. it was the same level?

A. Yes, sir; the same level.

Q. All the places of water formed a solid sheet right clear on through there to Turkey Creek, on along toward the railroad?

A. Yes, sir; yes, sir.

44 Q. So that even if this culvert had been absolutely stopped up there would have been water come in here from Turkey Creek just the same?

Mr. HAY: We object to that, Your Honor, as calling for the conclusion of the witness.

Mr. JONES: He has been concluding a little all along.

By the COURT: He may answer.

And to which ruling on the part of the court, the plaintiff, by his counsel, then and there duly excepted at the time and still excepts.

Mr. JONES: If this culvert had been stopped up here on the M., K. & T. at North Jefferson so no water could have gotten through, this water would have come in here from Turkey Creek just the same?

A. No, sir; the water run over the land up here; it run right across the M. K. & T. track over on this side.

Q. I say to have come in here from Turkey Creek wouldn't it have gotten on Mr. Tranbarger's land even if this culvert had not been opened up at all?

A. Possibly it might.

Q. It certainly would if it was as high in Turkey Creek as it was out here it would get through?

A. I suppose it would.

By the COURT: Did any water during that flood time come out of Turkey Creek anywhere along here and flow over any of this land?

A. No, sir; only right here in front of—south of Mr. Tranbarger's land; right in here (indicating).

Mr. JONES: Well, that water went all around up in here wherever it was low?

A. No.

45 Q. Could you tell the different waters?

A. Yes, sir. It forms a kind of a cup in here. The ground is considerable higher there and around in there; it holds the water right in here, and that water come in south of Mr. Tranbarger's house.

Q. This spot here is east of Mr. Tranbarger's house, marked "Dry," that was the spot out of water?

A. Yes, sir.

Q. And all the rest of this was covered?

A. The stockyards was right behind that "Dry-high" spot.

Q. Yes; and all the rest in here was covered with water clear out to Turkey Creek?

A. No, no, sir; I said over here—up here the waters didn't come

together; there was dry ground; a man could walk right down along the side of the fence.

Q. How wide was that strip?

A. It was a narrow strip.

Q. This water all in here connected?

A. I just mean what I say.

Q. All this water in here connected right up somewhere along here at various places, and was on the same level with the high water on Turkey Creek?

A. I answered the question. There was a little there along the fence there that the water didn't come together. Down south of Mr. Tranbarger's house it run into this little cup, all back there, and it stayed there, right here against the C. & A. track. The C. & A. track held that water there.

Q. Wasn't all this water in here marked light blue, wasn't that connected up at various places with the water at Turkey
46 .Creek?

A. That was connected with all this water back here.

By the COURT: Here is what he means——

The WITNESS: I understand what he means.

By the COURT: He means if this water came out of Turkey Creek and over on this side and forms a pool——

The WITNESS: Yes, sir; I told him no, it never did connect up. I answered that question.

Mr. JONES: I am not after that. I am talking about this——

A. I told you——

Q. Let me ask the question. I am talking about this water now on this space marked Mr. Tranbarger's and this in light blue.

A. Yes, sir.

Q. The water at various places connected with the water of Turkep Creek at high water time?

A. Immediately below Mr. Tranbarger's house, all down here, connected with Turkey Creek.

Q. Yes, sir.

A. And over, right up about pretty near Mr. Carl's line there was a strip there that didn't connect.

Q. Practically all the rest of it was one sheet of water; a little sort of an island standing out in the middle?

A. Yes, sir.

Q. Now, if that culvert there in the M., K. & T. had been stopped up altogether there would have been water over there just the same?

A. Possibly would.

Mr. HILL: I think that is calling for the witness' opinion.

Mr. JONES: You people were down there before the crest of the flood looking to see what you could do, were you not, to
47 prevent the water from flooding your lands?

A. No, sir; we were reading the newspapers to know what it was doing above, and phoning to Jefferson City and Kansas City.

Q. Didn't you have interest enough in your neighbor to go down there and try to protect him?

A. I looked over there.

Q. You didn't try to stop up that little three foot culvert in the M., K. & T.?

A. No, sir.

Q. You thought it wouldn't do any good?

A. It was not my property. I didn't know whether to stop it up.

Q. It was adjoining your property?

A. No, sir; it don't touch me at all. I had nothing to do with it; that was the railroad company's property.

Q. Now, this what you call the old bed of Turkey Creek, Mr. Carlton, that has been abandoned you say as a watercourse since about 1865 or '67?

A. No, sir; I started to tell you why that *it* carried off water there but, of course, you objected to the question.

Q. I am not asking you why so and so. I say that has been abandoned; Turkey Creek has another watercourse since '67?

A. If you would have allowed me to answer the question I could have explained all of that why Turkey Creek was used.

Q. I will let you make any speech that the court will let you after you answer my question.

Mr. HAY: We object to his insinuating remarks.

Mr. JONES: You have a law suit of this same sort?

A. Yes, sir.

48 Q. Against the Company?

A. Yes, sir.

Q. Now, just answer my question, please.

A. Put them.

Q. This Turkey Creek was, the course was completely changed along about 1867?

A. Yes, sir; it was. Turkey Creek was changed. It was a small ditch and it took about ten years to develop that ditch before it would take off all that water.

Q. And then from '67 to '77, somewhere in that neighborhood the change was completed; about ten years from the time it started?

A. It took about ten years to get that ditch changed.

Q. That railroad was built down across there about 1872, wasn't it?

A. Yes, sir.

Q. Now, the Wagner heirs or estate owned this land down here right in the intersection of the two tracks east of the C. & A. and north of the M., K. & T., didn't they?

A. Yes, sir.

Q. Now, in 1908 and prior thereto that land clear down into that corner was under cultivation, wasn't it?

A. I think so.

Q. Right through the old Turkey Creek bed was in cultivation, wasn't it?

A. I think so. We always planted those places and, of course, if it drowns out we lost out, and if we didn't drown out we gathered the crops.

Q. Certainly, certainly, that is true of that farm and of everybody else's farm.

A. No, not over my farm.

Q. Who did you mean by "we" then?

49 A. That we have it? I haven't. I have got some of that kind on the lower farms.

Q. And that and the Wagner estate was being cultivated in 1908 and prior thereto?

A. Yes, sir; sowed in wheat.

Q. Like the rest of the surrounding land there?

A. It was.

Q. They didn't leave any place there for a ditch or watercourse, did they?

A. It was already there; they didn't have to leave it.

Q. I sav they didn't leave anything—didn't plough up to the edge of it and then scoop over it?

A. I think they ploughed across it.

Q. Simply a low place there and they planted right through it?

A. I think so.

Q. Had their crop in there just like they did on the surrounding land?

A. Yes, sir.

Q. Now, you say that there is a ditch down the north side of the M. K. & T., east of the C. & A. at North Jefferson?

A. There is a drain; yes, sir.

Q. Well, is there a ditch?

A. Why, it's a drain; it's a drain that would average I suppose three feet to five feet; down next to where it empties into Clear Branch I suppose it is pretty near four or five feet deep. As it runs west it gradually grows less.

Q. Now, isn't it a fact that that is some several feet lower than the top of the rail?

A. No, sir. Now, where the dirt has been taken out is the bed of Turkey Creek. The M. K. & T. built the roadbed in part of old Turkey Creek, and then it zigzagged and run on the north side.

50 Q. Now, that old Turkey Creek bed went right—after it crossed what is now the C. & A. right of way—went practically south and on down across what is now the M., K. & T. right of way?

A. Yes, sir; it was.

Q. Well, that is where it used to run when there was a watercourse there?

A. Yes, sir.

Q. Right on down south?

A. Now, let me explain. The M., K. & T., it run here, south, and it run a little across the M., K & T. and run on down on the south side and then it crossed back on the north side.

Q. Up here (indicating)?

A. No, east.

Q. Well, this is east.

A. Yes, sir; this way.

Q. But it did cross clear over where the present M., K. & T. track is?

A. Yes, sir.

Q. And the M., K. & T. when they built there in 1902 built right solid across what the old bed was?

A. Yes, sir.

Q. Right solid across it again down further east, where it used to come back?

A. I think not.

Q. You don't know about that.

A. I think not.

Q. Now, you say that there is a ditch or culvert across that county road down there east of the junction at Jefferson City?

A. A culvert?

Q. A culvert or ditch across the public road north of the M., K. & T. track?

A. I think not.

Q. You think not? That road is built, just north of the M., K. & T. track, right up even with the M., K. & T. track. isn't it?

A. Which road?

Q. The county road?

A. You mean in coming from Jefferson City, going out to North Jeff?

51 Q. Yes, sir.

A. I haven't been along there. I think there is some culverts in that track.

Q. I mean in the county road.

A. Now, I wouldn't say positively.

Q. You said there was a drain on the north side of the M., K. & T. track; I want to ask you if that drain runs through the county road?

A. On the north side?

Q. Yes, sir.

A. Going east?

Q. Yes, sir.

A. It passes over the county road.

Q. Isn't the county road built up above that even with the M., K. & T. tracks there?

A. No sir; no, sir; I think not.

Q. How do you get up on to the tracks?

A. It is just a little slope going up.

Q. For how far back?

A. I couldn't say: ten feet or something like that.

Q. And ten feet it is right down level with this drain and then goes up to the track?

A. No, sir. Perhaps it would—about a half down there to a foot high.

Q. You have been down there recently, haven't you, Mr. Carlton?

A. Yes, sir.

Q. It is just about the same way as it has been for the last several years?

A. Why, it has been—I don't know when they threw that road up; not very long ago, though, I don't think.

Q. It has been several years?

A. No, I don't think it has been more than two or three years since.

Q. It has been more than a year?

A. I think so, possibly.

Q. It is practically the same way now that it was in June, 1908?

A. I think so.

Q. Now, you look at that photograph of the road on the
52 north side of the M., K. & T. track and just show us where——

A. (Showing the witness a photograph.) This is the north side?

Q. —where the drain is?

A. This is the north side?

Q. Here is the north side. This camera that we show Mr. Carlton is sitting on the C. & A. track, looking east, on the north side of the track. Here is the county road. Now, will you—you see the county road there approaching the track?

A. Yes, sir. Now, this is running east, is it?

Q. Yes, sir.

A. This is the M., K. & T.?

Q. Yes.

A. Well, there is where the drain is, right along here on the right of way.

Q. Now, look down at the county road—you see the county road there?

A. Yes, sir.

Q. Do you see any drain or ditch?

A. I told you they put a little dirt along there, but the drain—it drains right on east.

Q. Well, can you look at the photograph to refresh your memory and tell this jury—isn't that road two or three feet higher than the ground just west of it along next to the M., K. & T. track?

A. No, sir.

Q. Well, how much higher is it there?

A. It is not over a foot.

Q. Don't that road run out practically level clear across for fifty or sixty feet?

A. No, sir.

Q. As you can see it on that picture?

A. No, sir.

Q. It doesn't?

A. No, sir.

By the COURT: In other words, you mean that the approach
53 where the road approaches the track and the fill in order to make the approach, as made, that that does not obstruct the drain along the side?

A. Not materially; don't obstruct over ten or twelve inches. The water—right on the west side of it where they have taken out some

dirt to fill up that they made a hole there, but take it on the average it would not very little.

Mr. JONES: You say that that road runs down north there from the M., K. & T. track to the low point in about ten feet?

A. I think so; about that.

Q. You recognize that photograph there, don't you, of the surroundings, houses, crossings, etc.?

A. I think I do. I am not very familiar there with those houses. I don't pay much attention to them, how they are situated there, the situation of the houses there.

Q. You have been down there many times, haven't you?

A. I never paid much attention.

Mr. JONES: We offer this photograph as a part of the witness' testimony, to be Exhibit 1.

Mr. HAY: We object to the offer of the photograph for the reason that it is a part of the defendant's case in chief and not properly offered in this connection with the cross-examination.

Mr. JONES: The witness has identified it and recognized it as those things over there and the conditions have been the same for more than a year; they were the same in 1908.

By the COURT: I think that is within the discretion of
54 the court, and the court will allow him to offer this as a part of the cross-examination if that is the only objection.

Mr. SILVER: Our further objection is, that it has not been sufficiently proved to be a correct representation of the situation and surroundings over there.

By the COURT: That objection will be sustained.

Mr. JONES: Of course, I submit, your Honor, that a photograph proves itself, it speaks for itself.

By the COURT: If introduced for a certain thing it must show that it correctly shows that thing. You must either show that by the witness that it does, that it is a correct picture and correctly represents the conditions there, or by persons who are familiar with the conditions there other than the witness.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. JONES: Well, you have been there recently, haven't you?

A. Oh, I have been down there.

Q. Well, that picture correctly indicates various things there?

A. I couldn't say that it did. I wouldn't like to say.

Q. You wouldn't like to swear to that?

A. No, sir; I wouldn't to the surroundings there.

Q. Aren't you just as familiar with the crossing as you are with the old Turkey Creek bed?

A. I think not.

Q. Aren't you just as familiar with the crossing as you are with the road just north of the crossing?

A. I think not.

55 Q. Can't you tell us whether or not that is a correct representation?

A. No.

Q. Of the wagon road just north of the M., K. & T. track?

A. I wouldn't say the surroundings there—I wouldn't say it was.

Q. That is apparently a photograph of it, ain't it?

A. Aimed for that.

Q. You recognize the different places in there, don't you?

A. I do the station house there.

Q. That is a photograph looking down east of the M., K. & T. tracks across that wagon road, isn't it?

A. I suppose it is intended for that.

Q. Well, that is what it is, isn't it?

A. Well, I say I suppose it is; that you intend it for that.

Q. I am asking you now if that is not a photograph of that place?

A. Well, I couldn't say it is a correct photograph of that place.

Q. Can you show us anything on that photograph that is incorrect?

A. I couldn't say that I could.

Q. Well, you recognize everything you see there as correct as far as you can recollect?

A. There is a house, there is the station, a barn and one thing and another.

Q. The railroad track?

A. Yes, sir.

Q. Wagon road?

A. The wagon road; yes, sir.

Q. Everything you see on there in this photograph is just as you remember it, isn't it?

A. I wouldn't like to swear all—that I saw all.

Q. I say everything you see on there now, so far as you recollect, is correctly shown on that photograph as you recollect it?

A. I don't know; I couldn't say.

56 Q. Show us anything that is not correctly shown on there.

Mr. SILVER: What about the ditch there?

A. It don't show the ditch there. If a man would go there and look at it that photograph doesn't show that ditch there.

Mr. SILVER: As you remember it?

A. No; as I see it and have seen it.

Mr. JONES: That shows that road just exactly as it is and has been for a road for a year?

A. I didn't travel that road before. I can't say for a year; I haven't been along there recently.

Q. That road has not been changed in a year to your knowledge?

A. It doesn't show the drain there as I noticed it.

Q. Well, it is a photograph?

A. I have answered it. It doesn't show the drain.

Q. As you recollect it?

A. Yes, sir.

Mr. JONES: We offer it in evidence.

Mr. SILVER: Objected to because the witness does not testify that it is a correct reproduction of the ditch and some other matters there which are important things in this controversy.

Mr. JONES: If that is the only objection to it they should have objected to it at the time we offered to ask the witness about the exhibit, and not having objected then we submit that the photograph must go into the record to make the questions intelligible and become a part of the record.

By the COURT: Objection sustained.

57 And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. JONES: We simply offer it as a part of the cross examination of the witness and forming a part of the questions asked the witness without objection.

By the COURT: The court holds it is not admissible for any purpose until you properly identify and show that it is a true and correct likeness.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. JONES: Now, Mr. Carlton, who owns the land west of the C. & A. where the old Turkey Creek bed used to run?

A. Wagner.

Q. They own all west and east too?

A. No, they own—yes, they own all the land that Turkey Creek bed run over.

Q. That land along where the old creek bed was west of the C & A. was also in cultivation last year, and before that, was it not?

A. I think so.

Q. Planted along the old bed there just like it was in the surrounding lands?

A. Yes, sir.

Q. Now, Mr. Carlton, except in 1903 and 1908 you never saw any water in your life running down that old creek bed, did you?

A. Now, you objected to me telling that.

By the COURT: Now, just let the attorneys make the objections.

58 Mr. JONES: I say you never saw any water running down that old creek bed along by the C. & A. track there, except in 1903 and 1908.

A. When Turkey Creek overflowed that water run through there; run down there.

Mr. MILLER: He has asked you except in 1903 and 1908.

A. I never saw any water only in 1903 and 1908.

Mr. JONES: That is what I asked you.

A. Only in floods in Turkey Creek.

Mr. SILVER: How is that?

A. When that ditch was cut it was a small stream and Turkey

Creek would overflow when a big flood would come and it come right down there down the bed of Turkey Creek.

Q. The old bed, you mean?

A. Yes, sir.

By the COURT: He is inquiring though of later years, say the last ten, fifteen or twenty years?

A. No, I haven't seen any.

By the COURT: Have you seen any running along there except at those two times?

A. I haven't seen any water for the last ten or fifteen years, except those two time.

Mr. JONES: Now, your deposition was taken in this matter sometime ago, wasn't it?

A. Yes, sir.

Q. I will ask you if this question wasn't asked you and this answer made by you, "Your land lies on the bank of Turkey Creek?" answer "Yes, sir;" question—"Not considering the years 1903
59 and 1908 when was it you ever saw any flood waters flowing in the bed of old Turkey Creek?" answer, "I never saw any flood waters there except in the years 1903 and 1908." Is that correct?

A. I think I stated that, and——

Q. I just want to know if those questions were asked you and those answers given.

Mr. HAY: That is what he has answered here.

A. That is what I answered here.

Mr. JONES: Did you answer it there too?

A. I think so.

Q. The Missouri River in 1908 was clear over its banks—clear out of its banks all through this country and north of here?

A. In some places it was, and some places I suppose it wasn't.

Q. Well, it was out of its banks, generally speaking, in 1908?

A. In a great many places.

Q. It was what we call a "flood?"

A. Yes, sir.

Q. Never anything like it occurred since your recollection of the bottoms except once before?

A. That is all.

Q. Now, you say, Mr. Carlton, that the crops down east of the C. & A. road in that bottom were not destroyed by the high water?

A. Well, they was close to the C. & A. along there there was a very small per cent of it damaged or lost.

Q. Well, take that whole bottom now beginning from the C. & A. clear to the east of the Missouri River, wasn't it practically—wasn't practically all the crops in there overflowed and destroyed?

A. No, I got—I owned a farm three miles below, I got
60 seven hundred bushels of wheat and thirteen hundred barrels of corn about two or three miles east.

Q. Which way is that from North Jefferson?

A. That's east. Along next to Mrs. Wagner's land I believe they lost a little of the crops.

Q. The Wagner land is all up pretty close to the bluff?
A. No, it lays along next to the south of North Jefferson.
Q. How far is North Jefferson from the bluff?
A. It is not very far.
Q. Well, didn't the Wagner land come clear up to the bluff?
A. Yes, sir, along there. Mrs. Sarah Wagner, she owns a farm between that and the river; it borders on the C. & A. or did border on the C. & A.; but the Bridge Company has bought a road through there and it borders on that now.
Q. Now, Mr. Carlton, you understand that the land owners down in there themselves changed this bed and flow of Turkey Creek back in the 60's, don't you?
A. Down where? No, Phil Double did that.
Q. He was a land owner down there?
A. Yes, sir, he was a land owner there.
Q. They did that to stop the flow down in the east direction?
A. It did as I said after it washed out changed enough to carry all the water out.
Q. That was the purpose of changing the course to keep the water from coming down in this way?
A. Yes, sir, that was the intention.
Q. This Clear Branch down here east of North Jefferson, how far is that?
A. It is where the M. K. & T. has a bridge across Clear
61 Branch; it is close to a half mile I reckon.
Q. What size bridge is that?
A. It is a small bridge.
Q. It is a very small branch, isn't it?
A. No, sir. If you would see it when it is up you would think it is considerable of a stream.
Q. Oh, of course, when the branch gets up it might be a stout. I mean in normal times, Mr. Carlton.
A. It is a pretty fair branch.
By the COURT: What is its depth?
A. It runs three or four or five feet deep.
By the COURT: And its width?
A. It will run from thirty-five to forty feet in places.
Mr. JONES: You mean the average width of the water in the branch would be forty feet wide in normal times?
A. At a low stage of water it would be very little water; perhaps it would be ten feet.
Q. I mean in normal times?
A. No, it would not be that wide.
Q. Did you say it would average ten feet wide?
A. I suppose it would when the water run through
Q. Would it average a foot deep in dry times?
A. There would be no water in it at all in dry times.
Q. It is just a little branch?
A. It is considerable creek; it drains considerable territory.
Q. It is not big enough to be called a creek?
A. Yes, sir, we call it a creek.

62 Mr. MILLER: I thought you called it a branch.

A. It is as big as Turkey Creek up where I live, but not down there, but where I live Turkey Creek is small, like Clear Branch in places it is a small stream.

Mr. JONES: That is all. Mr. Carlton, water don't have to stand on potatoes more than a few hours to kill them?

A. No, it don't take long.

Q. Two or three hours would do the business, wouldn't it?

A. I don't know; but twenty-four hours or something like that would kill them.

Q. In your judgment wouldn't water standing six inches deep on growing potatoes for ten hours destroy them?

A. River water will kill potatoes in ten hours, but common branch water possibly wouldn't kill them so quick.

Q. This was river water down there?

A. Yes, sir.

Q. Now, the highest crest of the water in 1908 was on June the 19th, or about that?

A. Yes, sir.

Q. And in 1903, it was on the 5th of June?

A. Yes, sir.

Q. The 6th of June?

A. Yes, sir, the 6th.

Q. And in 1903, the water went down quite rapidly after its crest?

A. Yes, sir.

Q. Gone in a few days from off that land?

A. Yes, sir, it was gone in a short time.

Q. It was gone by the 15th of June, wasn't it?

A. Off that land?

Q. Yes, sir.

A. Well, of course, you understand the roadbed was
63 washed down and the water drained off.

Q. I am not asking you the reasons why, I asked you if the water was gone?

A. It was gone.

Q. Now, you were down there pretty often in 1908, on the 19th and the days before that?

A. Frequently, yes, sir.

Q. Didn't you see Mr. Tranbarger down there with some men working on the Chicago & Alton embankment to try to keep it from breaking through?

A. No, sir.

Q. You know that is a fact that he did work there, don't you?

A. No, sir, no, sir.

Q. You didn't see him?

A. No, sir.

Mr. JONES: That is all.

Redirect examination by Mr. HAY:

Q. Mr. Carlton, how long did the water stand on Mr. Tranbarger's land?
A. How long?
Q. Yes.
A. Oh, it stood on there, a part of it, until along in July sometime.
Q. How was it finally drained off?

Mr. JONES: We object to that, if Your Honor please, it is immaterial.
Mr. HAY: I think, Your Honor, the direction in which this water ran is very material.
By the COURT: If he can state that he saw water running there and the conditions so as to show the lay of the ground, he may state it.

64 And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: How was it drained
A. Why, there was a ditch cut.
Q. Where?

Mr. JONES: We object to that, if Your Honor please, to any work done down there.
By the COURT: The question is, to get before the jury and the court, what the real lay of that land is, how the water would run and what the surface is.
Mr. HAY: If that is the court's position we won't press the question. That is all.

By the COURT: Let me understand. Now, the M. K. & T. Railroad runs in an easterly direction?
A. Yes, sir.
Q. And this C. & A. runs in a northerly direction?
A. It runs——
Q. I mean generally north, not directly north, the other is probably not directly east.
A. Yes, sir.
Q. Now, then the M. K. & T. Railroad is built along and across the old bed of Turkey Creek, is it?
A. Well, a little ways.
Q. That is, it is built across it at one point, and along it at another place.
A. Yes, sir, along the side of it.
Q. Now, then, where it is built along it is it a solid embankment?
A. What, the M. K. & T.?
Q. Yes, sir.
A. Yes, sir.
Q. And where it is built across it is it a solid embankment?
A. Yes, sir.

65 Q. Then the M. K. & T. constitutes a solid obstruction all along the old bed of Turkey Creek?

A. Partly, it was built in the bed of old Turkey Creek.

Q. I mean is there any opening or is it a solid embankment along there?

A. It is a solid embankment. It has been solid all the time.

Q. Now, if there had been constructed a cross-ditch, or two cross-ditches, as you mention in your testimony, across the Chicago & Alton at the points you indicate in your testimony those cross-ditches would carry the water into the lateral or side ditches?

A. It would not carry or drain to the side of the M. K. & T.

Q. I mean as it carried it on to the right of way of the C. & A. one of them would.

A. The one next to the C. & A. would carry it along.

Q. The one down near the crossing that you speak of, the one down near the crossing of the C. & A. and the M. K. & T., that would carry it almost directly through into the lateral ditch of the M. K. & T.?

A. Yes, sir.

Q. But the other one would carry it in on the right of way of the Chicago & Alton?

A. No, sir; it is not on the right of way of the Chicago & Alton. It crosses a little corner of the Wagner land, the bed of old Turkey Creek and runs down to——

Q. Look at this map. (Shows witness the map in evidence.) Now, here is the north.

A. Yes.

Q. This is the C. & A. running up here north, and this is the M. K. & T. running along here east.

A. Yes, sir.

66 Q. This is the crossing of the C. & A.

A. Right across. Now, a culvert there would put that water right into the drain along the M. K. & T., and one up here across the bed of old Turkey Creek comes right in here, right down to the M. K. & T. (indicating on the map).

Q. Then you are not speaking of any cross drain anywhere west or anywhere south of the crossing of the two railroads?

A. No, sir.

Q. That is, as I understand you, there is no place south of the crossing of the roads along the line of the Chicago & Alton that any cross ditches could be erected?

A. I don't think they could be, because it is not necessary because this water all come in here along the side of the road.

Q. Then, in other words, the two cross ditches you speak of you mean should be up here, one north, immediately north of the crossing of the two roads, and one a little farther north still?

A. Yes, sir.

Q. And you say this first one, the one immediately north, would carry the water into the lateral ditch of the M. K. & T.?

A. Yes, sir.

Q. And then where would it go?

A. On down to Clear Branch.

Q. Now, the one that you speak of as being located still farther north, where would that carry the water to?

A. It would bring the water right into Clear Branch where the M. K. & T. has about a fifty feet——

Q. How would it get across this land?

A. There is already a bed there of thirty or forty feet, the bed of old Turkey Creek right across there.

67 Mr. JONES: You say there is no point on that creek but that is four feet lower than this ground up here?

By the COURT: Inside of the M. K. & T.?

A. Yes, sir.

Q. And the part of the old Turkey Creek bed that you speak of is a short distance from carrying it from the cross ditch you indicate——

A. Yes, sir.

Q. —down to the lateral ditch of the M. K. & T.?

A. Yes, sir.

Mr. HAY: Now, Mr. Carlton, is there any lateral ditch along the east side of the Chicago & Alton?

A. I think not.

Q. Well, now, in the event water did come through the culvert of the M. K. & T. up here and get on the west side of the Chicago & Alton would lateral ditches through the Chicago & Alton—I mean a cross ditch through the roadbed of the C. & A. carry the water into a lateral ditch on the east side of the C. & A. and on back into the Missouri River?

Mr. JONES: We object to that, if Your Honor please, as speculative and asking for the conclusion of the witness.

By the COURT: Unless there is some ditch here that it could be connected by——

Mr. HAY: Of course, if Your Honor please, this road runs on down here to the Missouri River.

By the COURT: Yes.

Mr. HAY: And the lateral ditch on the east.

By the COURT: Is there a water course or ditch in existence and was in existence at the time of this overflow running along

68 the east side of the Chicago & Alton Railroad and naturally connecting with other ditches or water ways down to the Missouri River?

The WITNESS: No, sir.

Mr. HAY: There is no lateral ditch construction on the east side of the C. & A.

By the COURT: I thought you said there was.

Mr. HAY: No, not on the east side of the C. & A.

By the COURT: Then south of this crossing there are no lateral ditches on either side of the Chicago & Alton?

Mr. HAY: No, sir.

By the COURT: This witness says there was in existence at that time no ditches or drains or water courses with which such a lateral ditch could be connected running down there.

Mr. HAY: I would like to ask the witness whether or not a

lateral ditch so constructed would be connected with the Missouri River; a lateral ditch on the east side.

Mr. MILLER: I object to that as immaterial.

The WITNESS: No, it could not.

By the COURT: Oh, no, not unless there are ditches.

Mr. HAY: With regard to the point Your Honor was asking about up here with regard to this Turkey Creek, I will ask you, Mr. Carlton, if there is any lateral ditch beginning here with Turkey Creek and extending down to North Jefferson?

A. No, sir.

Q. But that would connect with the ditch on the north side of the M. K. & T.?

A. Yes, sir.

Q. If such a ditch were dug?

A. Yes, sir.

69 Q. And the water would come from the opening into that lateral ditch and then into the drain?

A. Yes sir.

By the COURT: Now, then, this part of the old bed of Turkey Creek that would be used or necessary to carry water from the north cross section of which you speak, or cross ditch of which you speak, has that part of the bed of Turkey Creek been in cultivation like the rest of it, used in the same way?

A. I think so.

Q. And you have never seen any water running there except at those two times?

A. No, sir.

Recross-examination by Mr. JONES:

Q. Now, Mr. Carlton, you know that there is a culvert in the M. K. & T., right east of the C. & A. crossing, don't you?

A. Yes, sir.

Q. And don't you know that that point in there is lower than it is out east in here on the M. K. & T. and the water, if any was there, would run toward the culvert?

A. No, sir. There is a high place or bank right in here that the water wouldn't run over.

Q. I am talking about north of the M. K. & T.; don't it run down west toward that culvert?

A. No, I think——

Q. From the wagon road?

A. No, I think there is about a foot fall from that wagon road.

Q. Isn't that culvert in the low place there?

A. No, sir.

Q. You never took any elevations down there?

A. No, sir.

70 Q. It is all full of weeds and everything on that side of the road?

A. No.

Q. Isn't there a culvert right across here under this M. K. & T.

spur and on under the wagon road right opposite this M. K. & T. culvert?

A. I don't know about the wagon road, but there is a spur.

Q. And there is a culvert there?

A. There is a culvert under the spur in the M. K. & T., but I don't know under the wagon road. I don't know whether it is just opposite, or not.

Q. Wasn't that culvert put there to carry the water in that direction and they aimed to put that culvert in a low place?

A. I don't know what their intentions is.

Q. You don't mean to tell this jury you can tell a foot fall in that place there?

A. To look at it I think I could tell there is a fall.

Q. Outside of 1903 and 1908 you never saw any water running in that place along there just north of the M. K. & T., did you?

A. I never say any flood water out of the Missouri River.

Q. I say you never saw any water running along the side—running along the north side of the M. K. & T. except in 1908?

A. I have seen some surface water.

Q. Well, you never saw any water running along there?

A. Yes, sir; the surface water off the places would run down the drain by the side of the M. K. & T.

Q. Did you notice which way it run?

A. Yes, sir; it run east.

Q. Did you ever see any water, any volume of water run-
71 ning east over that wagon road?

A. Why, of course, if it wasn't enough to run it wouldn't run.

Q. Did you ever see any water in normal times, or times of normal, usual rains run east along the north side of the M., K. & T., east over that county road?

A. Yes, sir; I have seen in big rains the water would collect down in that drain and run east and come into Double Branch, I mean Clear Branch.

Q. Did you ever see any water running on the north side of the M., K. & T. track within twenty or thirty feet east across that county road in normal times?

A. Of course, I never did in dry weather.

Q. I am not asking you in dry weather.

A. That is the only way I can answer you.

Q. I mean in a normal time?

A. What do you call a normal time?

Q. I mean anything except floods as in 1908.

A. I told you in big rains that drain along there would carry the water and flow east; the water would run right down that drain and right on east into Clear Branch.

Q. Right over that county road?

A. Why, of course.

Q. Within twenty or thirty feet of the railroad track?

A. You mean was there any water flowing over that road?

Q. Within twenty or thirty feet of the railroad?
A. Yes, sir.

Mr. JONES: That is all.
(Witness excused.)

72 *Printed Abstract of Record, Pages* 124 *to* 150, *Inclusive.*

H. A. TRANBARGER, the plaintiff, of lawful age, produced as a witness in his own behalf, being first duly sworn, upon examination testified as follows, to-wit:

Direct examination by Mr. HAY:

Q. Mr. Tranbarger, you are the plaintiff in this suit?
A. Yes, sir.
Q. Where do you live?
A. Callaway.
Q. What part?
A. Southern part; just north of Cedar City.
Q. How long have you lived there?
A. Why, on the place I am on now I have been there twenty-one years.
Q. Were you living there at the time of the construction of the Chicago & Alton Railroad?
A. No, sir; I was living then just at the approach of the bridge.
Q. You remember the construction of the road?
A. Yes, sir.
Q. You own the land described in the petition and bordering on the roadbed?
A. Yes, sir.
Q. How long have you owned that?
A. Twenty years.
Q. Are you familiar with the construction of the roadbed of the Chicago & Alton across the bottom?
A. Yes, sir; I think so.
Q. I will ask you whether or not there are any openings across or through this roadbed at the present time, or have been for the past ten years?
A. No, sir; there is not.

73 Q. Have you ever noted whether or not this roadbed, constructed as you suggest, has obstructed the flow of surface water across the bottoms?
A. Yes, sir.

Mr. JONES: We object to that, if Your Honor please, as calling for the conclusion and opinion of the witness.
By the COURT: I think whether something obstructed the flow of water is a fact.
Mr. HAY: Why certainly.
And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Now, when was that, Mr. Tranbarger?

A. The first I knew of was 1903, the second was 1908.

Q. How did the water which was obstructed in 1903 come across the bottoms; from what direction?

A. Come from the west.

Q. On which side, that is, when the water—was this at the time of the high water of the Missouri River?

A. 1903; yes, sir.

Q. When the water began to come across the bottoms on which side of the M., K. & T. track was it?

A. It was on the west side.

Q. I mean of the M., K. & T. track, on which side of that?

A. It come down old Cedar Creek and come into Turkey Creek, backed up Turkey Creek and when it got down there to the point on the bluff north of the M., K. & T. station——

Q. North of the station?

A. Yes, sir.

74 Q. And then what did it come down?

A. It followed what used to be or what is the old Turkey Creek bed, and come on to the right of way of the Chicago & Alton, struck that embankment——

Q. Struck the embankment?

A. Yes, sir.

Q. Now, at the point where this water first struck the embankment was there ever an opening in the—across the roadbed of the right of way?

A. Yes, sir.

Q. When?

A. Yes, sir; when the road was built there, and kept there until about 1895 or 1896, I think, somewhere along there.

Q. Now, after the water struck the embankment what course did it then pursue?

A. Well, it—of course, now this last time I wasn't just there, but the general flow of it——

Q. I am speaking now of the flood of—well, yes, of the flood of 1903.

Mr. JONES: We object to that, if Your Honor please, it is immaterial. The witness says he was not there.

By the COURT: The trouble about it is we are going to get too much of a volume here. Let's get down to 1908; confine it to that.

Mr. HAY: Now, the flood of 1903, how did the water after it came to the embankment on the right of way—I mean 1908—which course did it pursue?

A. After it followed up this old bed it come right on over against the M. K. & T. along the point there where the two roads cross, and then it come up through this culvert.

75 Q. Through the culvert in the M. K. & T.?

A. Yes, sir.

Q. On to whose land is it?

A. It was on the Wagner land at first. At first it was on the

Chicago & Alton right of way, and then—but the land that joins right on to that, about three acres I think it is, belongs to the Wagner heirs.

Q. Whose land did it then flow on to?

A. Then on to Mr. Carl's, back west on to Mr. Carl's and Mr. Carlton's, coming on in a southwesterly direction on to me.

Q. Now, what direction did the water which came on to your land, what direction was it flowing as it came on your land; that is, the flood of 1908?

A. It was backing up west.

Q. West?

A. Yes, sir; west.

Q. Do you of your own knowledge—how do you know it was flowing in that direction?

A. Why, there was several persons come to me and said——

Q. Don't tell about what they said if you don't know of your own knowledge.

A. I don't know just what time it struck exactly. Of course, I knew it was getting up over there. Of course, the 1903 flood I was there. It was supposed to come the same way.

Mr. JONES: We move that that be stricken out.

The COURT: It may be stricken out.

And to which ruling on the part of the court, the plaintiff, by his counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Where were you at the time of this flood?

A. At the time the water got on me?

76 Q. Yes, sir; 1908?

A. I was at the house. But you must recollect the farm was in wheat and I couldn't tell the exact date, the time that the water got on to me on the back part.

Q. At any time did you note how the water was coming on to you?

A. Yes, sir.

Q. From what direction was it coming?

A. I went to see what it was doing, I heard it coming and I went out and it was coming west.

Q. West?

A. Yes, sir.

Q. Now, at any time did the water come on to your land from the east; no, from the west, flowing east?

A. At any time?

Q. Yes.

Mr. JONES: If the court please, we object to that as simply calling for a conclusion and the argument of the witness.

By the COURT: You may ask if the water came from any other direction.

Mr. JONES: I suggest, if Your Honor please, that he be required to state where the water was and the levels of the water, and it is a question for the jury to determine whether it came from all directions. If the water was of the same level practically of the

Turkey Creek bed now how in the world could he tell where it come from?

By the COURT: A man might go out and look on and he might not be able to tell just what the levels were, but he could tell with a certainty if the water was flowing in this direction through an opening.

77 Mr. HAY: You can see water flowing.

By the COURT: And he would be more certain of that than he would be about the level proposition.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Did you note whether the water came from any other direction than from the east to the west?

A. A little of it; yes, sir. There was one place just south of my house that it did; a small place.

Q. At what stage of the rise of the waters was that?

A. Well, it was getting up pretty well.

Q. In the first or last stages?

A. Why, it was along toward the latter part.

Q. Now, how much of your land was covered with the water which came from the east to the west before you noted the water coming from the west to the east?

A. Well, there was considerable, I don't know just exactly how much. I couldn't measure it, of course.

Q. Well, approximately, if you can give it.

A. Well, I suppose——

Q. What proportion of your land?

A. Maybe about half of the back part; maybe a half or a third.

Q. A half of it?

A. Yes, sir.

Q. Now, what space or how wide was the current or the space covered by the water which was coming from the west to the east?

A. From the west to the east?

Q. Yes, sir.

A. Just a small place. It was running along, winding around between the vegetation of my potatoes.

78 Q. How much of your land was finally covered by the water?

A. Well, practically all of it. I had a little—saved a little corn, a couple of acres.

Q. Then how many acres were covered by the water?

A. How many acres of land?

Q. Yes; were covered by the water.

A. Well, about fifty-five acres.

Q. Did you have anything growing on the land?

A. Yes, sir.

Q. What?

A. I had twenty acres of corn, thirty acres of wheat, and five acres of potatoes.

Q. Now, how many acres of corn?
A. Twenty acres.
Q. What was the condition of your crop at the time of the flood?
A. Why, I think it was first rate. I think it was fine; that is my judgment about it.
Q. Well, how many bushels—how long have you been a farmer?
A. All my life; I don't know anything else.
Q. Farmed in the bottoms?
A. Yes, sir.
Q. Now, how many bushels per acre would your corn—would the indications that your corn would have made?

Mr. JONES: We object to that as not a proper measure of damages and as purely speculative.
Mr. SILVER: In his opinion as a farmer.
By the COURT: He may answer in his opinion what the apparent yield would have been looking at the field on the day it was destroyed.
Mr. MILLER: The same objection.
79 And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

By the COURT: Viewing it as a farmer, standing looking at the field that day. If you were called upon to go over there and look at that field of corn that day before the flood, what would you have estimated its yield at that time?

Mr. JONES: The same objection to that.

The WITNESS: Fifty bushels.
Mr. HAY: Fifty bushels?
A. Yes, sir.
Q. That is, fifty bushels to the acre?
A. Fifty bushels to the acre.
Q. What was that corn worth and what was your loss because of the destruction of your corn?

Mr. JONES: We object to that as calling for an improper conclusion of this witness and invading the province of the jury.
By the COURT: My recollection of the rule is, gentlemen, that you can even show that at a time later you can show what the market value was less the cost of harvesting.
And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: In the fall what was the corn worth per bushel?
A. Sixty cents.

Mr. JONES: We object to that as immaterial.

80 Mr. HAY: What would have been the cost of marketing. I mean of harvesting it?
A. About three cents a bushel.
Q. Then what do you figure your crop worth?

A. I figure that——

Mr. JONES: We object to that as improper.

By the COURT: What was the reasonable market value of it at that time; the market value of the crop as it stood that day?

Mr. HAY: What was the reasonable market value of your crop as it stood that day?

Mr. JONES: We object to that as calling for the conclusion of the witness and an improper measure of the damages.

By the COURT: Objection overruled.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

A. Something over five hundred dollars.

Mr. HAY: For what, the corn?

A. Yes, sir.

Q. Can you give the figures?

A. If you will let me read a little memoranda I have got here. I might possibly state it otherwise, but then——

Q. What was your other crop; potatoes?

A. I had thirty acres of wheat.

Q. Was that wheat destroyed, or not?

A. Yes, sir, all but four acres that I harvested, and I harvested two acres of corn, that comes off this twenty acres, or only eighteen acres lost.

Q. You harvested four acres of corn?

81 A. Yes, sir.

Q. Is it four acres or two acres?

A. Two acres of corn and four acres of wheat harvested. I aimed to say that this corn, without taking—counting twenty bushels would have made a few bushels of corn, but then you see when you count it——

Mr. MILLER: We object to that.

Mr. HAY: You have explained the corn. Now, the wheat; what in your judgment would the wheat, as it looked to you at the time of this flood, have made per acre?

Mr. JONES: We object to that as speculative.

By the COURT: Objection overruled.

Mr. JONES: And not for the witness to say.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

By the COURT: As it appeared then what would have been the reasonable, fair estimate of its yield?

A. That that I got——

Mr. HAY: Answer the question.

A. Well, I will say twenty-five bushels, at least.

Q. How many acres did you have?

A. Twenty-six.

Q. What was wheat worth?

A. That fall?
Q. At the time of marketing?
A. It was worth eighty cents.
Q. What was the market value?
A. Worth eighty cents.
Q. What was the expense of harvesting and marketing?
82 A. The expense of harvesting I suppose would have been about a dollar and a half for an acre for harvesting, and the threshing could have been done for eight cents a bushel.
Q. In round prices what was your loss on the wheat?

Mr. MILLER: We object to that as an improper question and not the proper measure of damages, and as invading the province of the jury.

By the COURT: Figures are uncertain things; let the jury figure that; objection sustained.

And to which ruling on the part of the court, the plaintiff, by his counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Did you have any potatoes?
A. Yes, sir.
Q. How many acres?
A. Five.
Q. Judging from the appearance of the crop at the time of the overflow, the condition of it, what, in your judgment, would have been the yield per acre of your potatoes?

Mr. JONES: The same objection to the potatoes.

By the COURT: That is, standing there that day and looking at it what would you then say?

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

A. One hundred and fifty bushels.
Mr. HAY: Per acre?
83 A. Per acre.
Q. What were potatoes worth at the marketing time?
A. Worth seventy-five cents.

Mr. MILLER: We object to that as an improper question and not the proper measure of damages.

Mr. HAY: What was the reasonable market value of the potatoes at the time these potatoes would have been for the market?
A. Seventy-five cents a bushel.
Q. What was the cost of digging and marketing them?
A. It cost five cents a bushel.
Q. Now, Mr. Trautzger, how deep was the water upon your land?
A. Why, I don't know, I guess it varied considerable—oh, from a foot maybe to, I will say, from eight inches, and in some places it might have been two or three feet.
Q. From eight inches to three feet?
A. Well, say from eight inches to two feet and a half anyway.

Q. How long did it stand upon your land?

A. Well, now, several days. I don't know just exactly; I couldn't tell you.

Q. In what direction did it flow off?

A. Flowed west; no other show for it to get off only what could draw down into the old Turkey Creek bed and what little would go into the west. You see it drowned in—it had to go out the way it come in.

Q. Now, in what direction, then did the water flow off of your land, was it from the east to the west, or from the west to the east?

Mr. MILLER: We object to that as suggestive. He said once it flowed to the west.

84 By the COURT: He has stated how it flowed.

Mr. HAY: All right. Now, did any of it flow in the direction of Cedar City?

A. No, sir.

Mr. MILLER: I think, if Your Honor please, that has all been gone over.

By the COURT: Yes.

Mr. HAY: Now, Mr. Traubinger, is there any place along the line of the roadbed of the Chicago & Alton where an opening could have been made across the roadbed so that the water could have been drained to connect with any ditch or drain or water course?

Mr. MILLER: We object to that as calling for the opinion of the witness and invading the province of the jury.

The COURT: Well, he may answer.

Mr. MILLER: And also calling for the conclusion of the witness and involving a question of law.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

Mr. HAY: Answer the question.

A. It could have been cut beyond North Jefferson between that and the bluff.

Q. How far north of North Jefferson?

A. I suppose something like six or seven hundred feet.

Q. With what would this opening connect?

A. With the old bed—up in the regular track of the old Turkey Creek bed.

Q. And what, if anything, else?

A. Below there I guess about a half a mile it would empty 85 into Clear Branch.

Q. Now, I will ask you if there could be more than one opening constructed north of the M. K. & T. track connecting with any ditch or drain?

Mr. JOHNS: The same objection to that, and the question is leading and suggestive.

By the COURT: He may answer whether there are any other ditches or drains there in connection with that.

And to which ruling on the part of the court, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

A. I suppose it might be; yes, sir, I think so.

Mr. HAY: With what would that connect?

Mr. JONES: The same objection.

A. That would connect right along with the ditch on the side of the M. K. & T.

Mr. HAY: On the north side of the M. K. & T.?

A. Yes, sir.

Q. And that connects with what, if anything?

A. It connects right on down and runs into Clear Branch and Clear Branch goes on down and empties into Double Branch and that empties into the river.

Q. What river?

A. The Missouri River.

Q. What distance is it along the routes you have just described from the C. & A. tracks to the Missouri River?

A. Counting from the C. & A. track?

Q. Yes, sir; North Jefferson?

A. Oh, I suppose it is something like three miles.

86 Q. How far is it from the C. & A. track where this opening could be constructed to Clear Branch?

A. A half a mile I suppose.

Q. Now, describe this ditch or drain on the north side of the M. K. & T. track?

A. On the north side?

Q. Yes.

A. Why, there is a plain for some distance on the start from the old bed there.

Q. The bed of what?

A. The old bed of the old Turkey Creek as it originally run there, that goes on down almost to the M. K. & T. and then there is a ditch or drain from there runs on down to the road, the county road.

Q. Well, then what?

A. And from that runs straight on although there is a little raise there in the road where the road comes on there, a little raise, not very much, and goes right straight on down and below there is a plain too of the—where the M. K. & T. made a ditch, a bed.

Q. Now, then this connects with Clear Branch as you stated a moment ago?

A. Yes, sir.

Q. How wide is this drain?

A. Oh, I don't know, I suppose thirty feet maybe; I suppose it is.

Q. Thirty feet? Steep banks on either side?

A. Yes, sir.

Q. How deep is it?

A. Oh, I suppose something like three or four feet; in some places maybe more.

Q. In what direction does it slope?

A. East.

Q. At the time of the overflow in 1908 did you notice any water on the east side of the Chicago & Alton track?

87 Mr. MILLER: Whereabouts?

Mr. HAY: South of the M. K. & T. track, east of the C. & A. and south of the M. K. & T. railroad?

A. Nowheres near the two roads; no, sir.

Q. Opposite your land, was there any water on the east side of the C. & A.?

A. Why, there was just a little bit that run through the track, between the ties, that a few little holes let through; "seep water" some of them called it.

Q. That reminds me. Mention was made a moment ago on cross examination of Mr. Carlton about your working on the embankment down there to keep it from breaking and the water coming over; explain that to the jury.

A. That is news to me.

Q. Did you do any work there?

A. No, sir; not a lick.

Q. Was there anything said to you by anybody about doing any work there?

A. No, sir. Maybe I can—maybe that may have started in this way: Along when the flood was about the highest there was a man wanted me—he had had the track watched, had put a watch on the track on the night of the 18th of May. I went into town in the morning, I went down in a boat and he told me what he had done and asked me to give him a quarter to pay for it. I said, "No, I haven't got any money to pay for the Chicago & Alton on that road; I haven't got that much money." He says, "You don't understand me," he says "I want——"

Mr. JONES: I don't see that this is material.

By the COURT: He says he didn't do that and that ends it.

88 Mr. HAY: Now, how deep did the water come on the east side of the track opposite your land?

A. Why, I don't know there was very little, wasn't very much water east only just around Cedar City there was some there.

Q. Were there crops growing over there?

A. Yes, sir.

Q. Were they destroyed?

A. Only a little just north of Cedar City where it backed up.

Q. Opposite your land were the crops destroyed to any extent?

A. No, sir, very little.

Q. And up to North Jefferson?

A. Up to North Jefferson, no, sir. I had a little meadow on the east side up there this side of North Jefferson, I harvested that meadow after it was over before I could do anything any place else.

Q. Was the water up there at all during the time of this flood?

A. No, sir.

Mr. HAY: That is all.

By the COURT: We will take a recess until 1:30.

Court convened at 1:30 P. M. pursuant to adjournment on the said 11th day of March, 1909, and the further taking of testimony in this cause resumed.

H. A. TRANBARGER, the plaintiff, recalled to the stand for cross-examination by Mr. Jones:

Q. Mr. Tranbarger, how deep was the water on your place at the deepest place in 1908?

A. Why, I don't know, I didn't measure it. I didn't take any measurements. There may have been some holes that was a couple of feet maybe.

89 Q. Well, leave out the holes. I don't mean in holes or anything of that sort. I mean where the ground was comparatively level and low, about how deep was the water at the deepest places?

A. Well, I suppose something like from eight inches to a foot.

Q. Now, not deeper than that you think over any considerable portion?

A. Well, now, I don't know. Over the most of it I wouldn't think.

Q. Well, do you think there were any places as big as this room where it was deeper than that?

A. It might have possibly been.

Q. How much deeper?

A. Well, I believe I said from eight inches to two feet, didn't I? That's about as near as I can give it.

Mr. MILLER: I put it down, from eight inches to two feet and a half.

Mr. JONES: There was a part of it was as deep as two feet and a half?

A. Hardly.

Q. It run from eight inches to two feet?

A. Yes, sir.

Q. Now, at several places you could have gone in a skiff or boat right off your land across the public road into Cedar Creek, couldn't you?

A. No, sir.

Q. Didn't the water connect right up?

A. No, sir.

Q. Did it not in several places?

A. As I stated awhile ago, there was one place just south of the house that you could.

Q. Well, is that the only place that Cedar Creek overflowed?

A. It is the only place that it got in there that you could

90 run a boat or anything like that that I know of.

Q. Wasn't the public road practically all under water?

A. The road was, yes, sir, the most of it.

Q. And wasn't it a solid sheet of water in many places from your land or Mr. Carlton's land right towards the creek?

A. In some places it was, but not all places.

Q. I didn't say in all places, I said in many places. There was

clear from your land right on across the road, clear to the creek, wasn't there?

A. I said in some parts there was, yes, sir.

Q. Well, practically for the distance of that road I think there was, wasn't there?

A. I think not.

Q. How much, what proportion?

A. Possibly one-third; I don't know.

Q. That would be—this place would be a solid sheet of water from the C. & A. tracks on west and northwest to Cedar Creek and on beyond Cedar Creek, wasn't it?

A. Well, the water was coming—it run back and flowed back on the track.

Q. I am not asking which was the way the water was running, or whether it was standing still, Mr. Tranbarger; I think you understand me. I say in this place, you say about one-third of the distance up this road next to Cedar Creek that the water was clear over it and connecting with the water on your lands and Mr. Carl's, I say in this place—in that place, or those places, the water would be a continuous sheet from the C. & A. tracks west and northwest
91 on out to Cedar Creek and on beyond Cedar Creek?

A. No, sir, very little of it between my house and Mr. Carl's.

Q. Well, whatever space there was it would be a continuous sheet of water from the track clear on beyond the creek?

A. Well, as I said the water was backing out, running out from the back of the dump, of course.

Q. Well, now, didn't you understand the question? When the water was at its highest was there a continuous sheet of water from the C. & A. tracks west and northwest on to Cedar Creek?

A. No, sir, I think not.

Q. At any place?

A. Well, as I said—I have stated it as best I can.

Q. I have just asked you whether there was, or not. You saw it?

A. At any place?

Q. Yes, sir, at any place?

A. I told you there was one small place there where it went in.

Q. I am not talking about that place down there now.

A. Sir?

Q. I am asking you and you have stated that probably one-third of the way up this road the water was clear over from Turkey Creek on to your lands over toward the railroad?

A. No, sir.

Q. What did you mean when you said just now it was beyond about one-third of the way?

A. I said a part of it backed back there.

Q. I want to know if there was some water there?

A. There was some water there, yes, sir.

Q. Now, that continued on west, that sheet of water from the railroad track on west across Cedar Creek and clear on up to the Missouri River, didn't it?

A. I suppose so. I wasn't across the creek.

92 Q. And yet you saw across there a solid sheet of water clear on up northwest to the Missouri River?

A. Yes, sir, across the creek.

Q. Now, Mr. Tranbarger, that is the only time the flood water has ever overflowed your land here except in 1903, isn't it?

A. Yes, sir.

Q. That was along about the first part, the fifth or sixth of June, 1903, the crest of the flood?

A. I think it was, yes, sir.

Q. And it went down quite rapidly after that, didn't it?

A. Yes, sir.

Q. Practically gone in ten days?

A. Yes, sir, less.

Q. That destroyed your crops in there that year, didn't it?

A. Yes, sir.

Q. You are familiar with this—the water in 1908, the flood of 1908 stayed up higher a great deal longer than it did in 1903, didn't it?

A. It came in slower and it was up longer.

Q. It would go down a little bit and come back up again, down again and back up again for several days?

A. Along toward the first of it it was, yes, sir; but after it got up higher it stayed.

Q. That was the way it was working for about ten days, down a little bit and then up higher again?

A. Yes, sir.

Q. Now, you are familiar with the Wagner land up here just north of the North Jefferson Station, are you not?

A. I think so.

Q. That was all under cultivation in June, 1908, and the year prior to that, wasn't it?

A. I think so.

93 Q. Clear down into the junction there at North Jefferson?

A. Yes, sir.

Q. Clear down to the right of way of both the Chicago & Alton and the M., K. & T.?

A. I think so.

Q. Now, Mr. Tranbarger, you say that you did not pay any man to do anything along the C. & A. track at the time of that flood, or help pay him?

A. I didn't pay any man to do any work on it at all, no, sir.

Q. Didn't you help pay a man there to patrol that track for a day or night or two?

A. No, sir.

Q. Didn't you contribute towards paying a man to patrol that track?

A. No, sir.

Q. At any time there?

A. I said no, I didn't pay any man to work that track.

Q. Didn't you pay a man to watch that track, help pay him?

A. I paid a man, at least, there was a man come to me——

Q. Didn't you pay him now?

Mr. HAY: Let the witness answer the questions now.
By the COURT: Well, you may answer the question.

Mr. JONES: Did you help pay any man?
A. There was a man come to me and asked me, and said——
Q. I have not asked you for any conversation. I just want to know if you helped pay any man.

By the COURT: I think the question can be answered by yes or no; he either paid him or didn't pay him.

94 Mr. JONES: Did you help pay any man to watch the track?
A. To watch the track?
Q. Yes, sir.
A. To watch the track and give the alarm, yes, sir, one night, should it break.
Q. Yes, sir.
A. Should it break, alarm the people on the lower side should it break.
Q. Now, you helped pay Mr. Foster, didn't you, to watch that track?
A. Well, now, let me study.
Q. I want to know if you helped pay Mr. Foster to watch that track?
A. I paid Mr. Dunn to pay some man.
Q. Yes. Now, you remember Mr. Delow, the engineer of Maintainance of the C. & A. coming down there and meeting you and some other gentlemen about the time, or a day or two after the crest of this flood and talking about making an opening in the track and through the bank down there, don't you?
A. I don't remember any man talking to me about making an opening in the track. Mr. Delow, I don't know the man.
Q. Didn't he come down there and see you and some other men and didn't you go out there and protest against any opening being made in that track?
A. No, sir.
Q. And didn't you tell him if any opening was made in that track anywhere it would wash your land out and you didn't want any opening?
A. No, sir.
Q. Didn't you tell that to some man down there representing the Chicago & Alton?
A. No, sir.
Q. Didn't you know the section foreman there at the time?
A. Mr. Hamilton?
95 Q. Yes. Wasn't he present there with Mr. Delow and didn't you protest against them putting any opening there?
A. No, sir. I don't know Mr. Delow.
Q. Didn't you tell them that your land and the land of these people there, these other people, would be washed out if they put an opening in that track?

A. No, sir.
Q. And didn't you protest against putting an opening in there; an opening being made or put in there?
A. No.

Mr. SILVER: I object to that, that is a mere repetition. He keeps answering no all the time.
By the COURT: Yes.

Mr. JONES: That is a fact if that had broken or an opening cut through down here anywhere it would have washed your land badly?
A. It didn't do it in 1903. It broke there and broke out beyond all the way along.
Q. You were afraid it was going to break down there in 1908, and wash your land, wasn't you?

Mr. HAY: We object to that, it is mere repetition. He is going over it again and again.
By the COURT: He has answered that he did not object to any opening in the track there and that is all of that.

Mr. JONES: You were paying to have that track patrol-ed so as to warn people below, were you?
A. That is the way the man represented it to me. The work had been done.
Q. Now, wait a minute, I didn't ask you that. You were
96 paying so as to have that track patrol-ed and warn the people below, were you? Don't you know?
A. Yes, sir, I know.
Q. Well, were you?
A. As I wanted to state awhile ago, but you wouldn't let me——
Q. I want to know if you were paying to have that track patrol-ed so as to warn the people below?
A. To give the alarm at night if it should break, yes, sir, to give the alarm to people at night.
Q. That was your purpose——

Mr. SILVER: I object to his repeating. He says he did and what is the use of asking it over and over.

Mr. JONES: That was your purpose in paying the man to watch the track?

A. Altogether, yes, sir. It was represented to me that way, that was what it was done for, to warn the people below if the track should break at night.
Q. You were more interested in the people below than you were in yourself?
A. Not by a whole lot.

Mr. HAY: We object to that.
Mr. JONES: Do you know Mr. Dunn; W. W.?

A. Yes, sir.
Q. Wasn't he over there about that time talking to you about the situation?

A. His brother was the man that got the money from me, but not W. W. Dunn.

Q. Didn't you talk to W. W. Dunn?

A. No, sir, I have no recollection of talking to W. W. Dunn, not then. I saw a great many people.

Q. When you paid Mr. Dunn that money didn't you state to him that if there was an opening permitted in that track,
97 or if it broke through it would wash your farm away and ruin you?

A. No, sir.

Mr. JONES: That is all.

Redirect examination by Mr. HAY:

Q. Now, Mr. Tranbarger, explain in your own way the circumstance about which you paid this money, and how much it was that you paid?

A. It was on the morning of the——

Mr. JONES: That's all right, the circumstance, except the conversation.

Mr. HAY: At this point I submit that this is calling for a transaction with a party and the information on which he acted and the part of the transaction that was said between the two is clearly admissible.

By the COURT: I think whatever may be relevant to the paying of the money is admissible, but there may be part of that conversation that would not explain that and not admissible.

Mr. HAY: I don't know.

By the COURT: Just that part of the conversation about this money.

A. He come to me and asked me if I would give a quarter to pay for watching that track. I said, "No, I don't want to pay the Chicago & Alton to keep their track up." He said, "You don't understand me." He said, "We had a man on the track last night watching in the event it breaks to warn the people below." He says, "A quarter ain't much. Won't you give that much?" I said, "Yes,
98 if that's what you want it for." But the work had been done the night before. That is the way he represented it to me. Whether it was ever done or not I don't know, but that is what I paid this quarter for.

Mr. SILVER: Was that all you paid?

A. Yes, sir. I give him a half a dollar and he started to go and make the change and he come over and he said, "Henry, I will keep this quarter." He says, "We have not watched it any more than it was necessary." That is the way that quarter come up.

Mr. HAY: That is all.

Mr. JONES: Who was that you were talking to?

A. D. V. Dunn.

Mr. JONES: That is all.

Witness excused.

It is admitted that the defendant company has been operating this line of road through Callaway County referred to in the evidence as the Chicago & Alton Railroad Company since August 8, 1906, and is still operating it, and that said line of road was built by the Louisiana and Missouri River Railroad Company in the year 1872, which company is a corporation organized and existing under the laws of the State of Missouri its charter having been granted by a special Act of the Legislature of the State of Missouri in 1872 or 1873, and is found in the Session Acts of that date for this state, and still owns said road, and that the Chicago & Alton Railroad Company is operating said road under some agreement with said Louisiana and Missouri River Railroad Company and has been so doing since August 8, 1906.

Mr. HAY: The plaintiff rests.

Mr. JONES: We want to offer a demurrer.

Whereupon, the defendant company, by its counsel, requested the court to give to the jury, in the nature of a demurrer to plaintiff's evidence, the following instruction, to-wit:

"Comes now the defendant at the close of plaintiff's case in chief and moves the court to instruct the jury that upon the pleadings and evidence your verdict must be in favor of defendant."

Which said instruction prayed by defendant, the court, of its own motion, overruled and refused to give the same to the jury, and to which action on the part of the court in overruling and refusing to so instruct the jury, the defendant company, by its counsel, then and there duly excepted at the time and still excepts.

99 *Printed Abstract of Record, Pages* 184 *to* 192, *Inclusive.*

J. E. SCHWAAB, of lawful age, produced as a witness on behalf of the defendant, being first duly sworn upon examination testified as follows:

Direct examination by Mr. JONES:

Q. What is your business, Mr. Schwaab?

A. I practice civil engineering for the Chicago & Alton Railroad.

Q. How long have you been a civil engineer?

A. About seven years.

Q. Mr. Schwaab, did you make a topographical survey of the bottoms north of the Missouri River between Cedar City and North Jefferson?

A. Yes, sir.

Q. When did you make that?

A. About—between November and February.

Q. 1909?

A. 1909.

Q. About how much time did you occupy in making that?

A. Well, I was about—I was about sixteen days making the survey.

Q. Now, did you take elevations at frequent intervals, spaces, all over that bottoms as indicated?

A. Yes, sir.
Q. Did you make a map of that survey?
A. Yes, sir.
Q. Topographical map?
A. Yes, sir.
Q. What is this I hand you, Mr. Schwaab?
A. That is a topographical map showing the contours, ele-
100 vations about every foot; showing all the depressions in the ground and the high places?
Q. Between what points generally?
A. Between Cedar City and the bluff and from west to Cedar Creek and north to the bluff, and then east of the track, of the Chicago & Alton track about a few feet.
Q. And running north of the North Jefferson junction or station there about how far?
A. About eight hundred feet.
Q. Is that the map you just stated that you made of that?
A. Yes, sir, that is the map.
Q. You made that map from the survey.
A. I made that map from the survey.
Q. Does that show correctly the contours and elevations?
A. Shows them correctly.

Mr. JONES: We offer that map in evidence.
(Said map marked "Exhibit 2") Map attached and inserted.

Mr. JONES: What is the scale?
A. Two hundred feet to the inch.
Q. Now, I notice little marks here, figures all over the map, those are the elevations?
A. Those are elevations.
Q. Now, for instance, I see here at one place 550.6 describe to the jury there what that means.
A. Well, the elevation 550.6 means that that point is the difference between the other part at 549 of an elevation of one foot and six-tenths.
Q. I want to know what you mean by being 549; for instance, 549 above what?
A. 549 is the Chicago & Alton standard elevations, standard levels.
101 Q. What they call Chicago & Alton standard levels?
A. Standard levels, yes, sir. And the difference between that and the St. Louis Directorate is 415.3 feet, or between the De Loxi Datum is 1.53 feet; that is the Government data.
Q. Have you figured out just what is the difference between the standard elevation you use and that that Mr. Baker claims to have used down there?
A. Yes, sir.
Q. At the turn-table?
A. Yes, sir.
Q. What is the difference?
A. 455.14 feet.

Q. Now, just tell us how you got that according to the elevations you have here on the standard direct-ate's.

A. My elevation on the turn-table at the part where Mr. Baker took his elevations was 555.14. He used 100—he estimated 100, the difference between 555.14 and 100 equals 455.14.

Q. Mr. Schwaab, have you determined the mark on this map, the high water marks in various places?

A. Yes, sir.

Q. Just give them, will you?

A. There is an elevation at Mr. Tranbarger's house, his elevation 553.18.

Q. That is the high water mark?

A. That is the highest water mark. The elevation opposite the C. & A. depot is—at Cedar City—is 553.17. The elevation west and a little south near Cedar Creek is 553.4.

Q. That is still south of Cedar City?

A. Yes, sir, south and a little west. Now, the elevation at the bridge over Turkey Creek on the M. K. & T. line is 553.89.

102 Q. How far is that point now west of the C. & A. track, about?

A. 2,711 feet.

Q. A little over a half of a mile?

A. Yes sir.

Q. Now, any other point over here that you have the high water mark?

A. This is the high water mark here about seven hundred feet below the M. K. & T. crossing with the C. & A. is 553.41. Just a little bit north and west of the C. & A. crossing with the M. K. & T. the elevation is 553.36. The elevation at the highway bridge across Cedar Creek, a little north of Ed Burnham's house is 553.46.

Q. The bridge you mention is a wagon bridge?

A. Yes.

Q. And it is three or four hundred feet west of the M. K. & T. bridge over Turkey Creek?

A. Just about two hundred and eighty feet.

Q. Have you got the high water marks at the bridge along the Missouri River?

A. Yes, sir.

Q. The wagon bridge is that?

A. Yes, sir.

Q. Goes across the Missouri River?

A. Yes, sir.

Q. Now, what was the high water mark?

A. The highest water mark?

Q. Yes, the highest water mark?

A. Is 136.3, St. Louis Direct-ate's Datum.

Q. Now, what would that be according to the Chicago & Alton standard upon which you have made this large map?

A. 551.6.

Q. So down in the channel of the Missouri at the bridge

103 the high water mark in June 1908, was 551.6 according to the Chicago & Alton standard?

A. Yes, sir.

Q. Can you give us the elevation of the M. K. & T. track up here at the Turkey Creek bridge?

A. The elevation is 554.92 at the base of rail. That is just a little bit east of the bridge. I can give you exactly on the bridge if it is necessary.

Q. Well, do you know whether or not the water went over the M. K. & T. track at that point, along in there?

A. It didn't go over the rail; the water did not go over the top of the rail.

Q. At that point?

A. No, sir.

Q. You haven't got any high water marks between that bridge and the North Jefferson junction along the M. K. & T. track, have you?

A. No, sir.

Q. Well, now, have you got the elevations of the M. K. & T. track along about half way between these points?

A. Yes, sir.

Q. What is it?

A. 552.55.

Q. That is the top of the M. K. & T. rail?

A. That is the base of the rail; the top of the rail would be about 552.9.

Q. That is about a foot lower than the high water mark at that point?

A. 552.9?

Q. The high water mark in that neighborhood is 553.8?

A. Yes, sir.

Q. What is the elevation of the M. K. & T. track at a point two thousand feet west of the North Jefferson crossing?

A. The elevation of the top rail?

Q. Yes, sir.

A. 553.21.

104 Q. That was about a half foot under the high water mark in that locality?

A. Yes, sir.

Q. Can you tell from this about how long the Missouri maintained its highest raise?

A. Yes, sir.

Q. About how long?

A. About eleven days.

Q. That was in June, 1908, you are speaking of?

A. Yes, sir.

Mr. JONES: You may examine the witness for the present.

Cross-examination by Mr. HAY:

Q. Mr. Schwaab, you say you made this map for the Chicago & Alton Railroad Company?

A. Yes, sir.

Q. You are in the employ of that company now?

A. Yes, sir.
Q. And you were at the time of making this Map?
A. Yes, sir.
Q. How long have you been in their employ?
A. About four years.
Q. Most of the time since you have been a civil engineer you have been in the employ of the railroad?
A. The most of the time? No, about half of the time.
Q. Have testified in a number of cases like this, have you, for the company?
A. Not very many.
Q. Now, did you get the elevation of the high water mark on the east side of the railroad as well as the west side?
A. Yes, sir.
Q. What difference did you note between the high water mark on the east and on the west side?
Mr. JONES: I forgot to have him give those. Let him give them.
105 Mr. HAY: Yes, I noticed you left that out.
A. Two and one-half feet.
Q. How?
A. Two and one-half feet.
Q. Was two and one-half feet above that on the east side—on the west side it was?
A. Yes, sir.
Q. You say you made that map, Mr. Sylvestis?
A. Yes, sir.
Q. Drew it off with your pencil or pen?
A. Yes, sir.
Q. Is that the way you made that map? Do you mean to say you drew that off on that paper with your pen or stencil?
A. That map there?
Q. Yes, sir.
A. I made the original and that map was copied from it.
Q. Then it is not the map that you made?
A. It is a copy; a correct copy of the map I made.
Q. How did you make that copy?
A. How did I make that copy?
Q. Yes, sir.
A. That was made—well, the way that was made, we have, originally you have a piece of tracing cloth that that was made on originally; you take that tracing cloth and you have prepared paper and you put this here original plat over the top of this and put it out in the sun or the light and leave it there a certain length of time and all the black lines come out white on the blue print paper.
Q. Now, where is that original map you made?
A. The original map is in Chicago, Illinois.
Q. Chicago, Illinois? When were you subpoenaed to appear in this case?
A. Subpoenaed?
106 Q. Yes, sir.
A. Last night I was subpoenaed.